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Case No. OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 2002

CHANG QIN ZHENG, and
JIN SHUANG ZHENG,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for Writ of Certiorari
to the Eleventh Circuit Court of Appeals

PETITION FOR WRIT OF CERTIORARI

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112 pp

A. QUESTIONS PRESENTED FOR REVIEW

1. Whether the enhanced immigration criminal statute, 8 U.S.C. § 1324(a)(1)(B)(i) (bringing in and harboring illegal aliens "for the purpose of commercial advantage or private financial gain"), was intended by Congress to apply to mere employers who in no manner assisted the underlying illegal entry or smuggling, but who provided only incidental employee benefits, competitive wages, room, board, and transportation to and from work; a question of first impression from a published opinion of the Eleventh Circuit Court of Appeals.

2. Whether the Eleventh Circuit Court of Appeals, in reasoning that 8 U.S.C. § 1324(a)(1)(B)(i) applies to mere employers, correctly construed the statutory language of 8 U.S.C. § 1324(a)(1)(B)(i) ("commercial advantage or private financial gain") in accordance with the Due Process Clause and this Court's decision in *Keller v. United States*, 213 U.S. 138 (1909), by its conclusion that the terms of the statute were synonymous with "an additional profit specifically for a particular person or group," *United States v. Zheng*,

306 F.3d 1080, 1086 (11th Cir. 2002); (A-15),[1] when the employers were not connected to any smuggling ring or sweatshop operation.

[1]References to the Appendix will be made by the designation "A" followed by the appropriate page number.

B. PARTIES INVOLVED

The parties involved are identified in the style of the case.

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CHANG QIN ZHENG, and
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UNITED STATES OF AMERICA,
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On Petition for Writ of Certiorari to the Eleventh Circuit Court of Appeals

PETITION FOR WRIT OF CERTIORARI

The Petitioners, Chang Qin Zheng and Jin Shuang Zheng, respectfully pray the Court to issue its writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit entered in this case on 17 September 2002, (A-1), rehearing denied on 06 November 2002 (A-20).

D. CITATIONS TO OPINIONS BELOW

United States v. Zheng, 306 F.3d 1080 (11th Cir. 2002).

E. BASIS FOR JURISDICTION

The jurisdiction of the Supreme Court of the United States is invoked pursuant to 28 U.S.C. § 1254(1) to review the final judgment of the United States Court of Appeals for the Eleventh Circuit rendered on 17 September 2002, *see Zheng*, 306 F.3d at 1080; (A-1), and finalized on 06 November 2002 when rehearing was denied. (A-20).

F. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Constitutional Provisions

This case requires interpretation and application of Amendment V of the Constitution of the United States, which provides in pertinent part that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law . . . ."

2. Statutory Provisions

8 U.S.C. § 1324(a)(1)(A). Bringing in and harboring certain aliens [Criminal penalties] (Reproduced in Appendix, A-72).

8 U.S.C. § 1324a. Unlawful employment of aliens
(a) Making employment of unauthorized aliens unlawful (Reproduced in Appendix, A-72).

(e) Compliance (Reproduced in Appendix, A-73).

(f) Criminal penalties and injunctions for pattern or practice violations (Reproduced in Appendix, A-73).

G. STATEMENT OF THE CASE

1. Jurisdiction vested in the United States District Court for the Northern District of Florida pursuant to 18 U.S.C. § 3231 for a criminal prosecution initiated under 8 U.S.C. § 1324(a)(1)(B)(i).The indictment alleged that the Petitioners, Mr. Chang Zheng and Mrs. Jin Zheng (husband and wife),[2] with knowing and reckless disregard of the fact that certain named aliens had come into and entered the United States (8 U.S.C. § 1324(a)(1)(A)(iii)), did knowingly conceal, harbor and shield from detection such aliens for the purpose of commercial advantage and private financial gain (8 U.S.C. § 1324(a)(1)(B)(i)) (hereinafter "'commercial advantage'

[2]The indictment also named Zheng Wei Zheng, Petitioner Chang Zheng's brother.

enhancement"). (R1-1).[3] The theory of the prosecution was that the Petitioners concealed, harbored and shielded from detection illegal aliens/employees, several of whom were family members, by providing employment in a family owned and operated restaurant together with employment benefits, which included transportation to and from the restaurant business, housing, and food. The indictment and theory of the prosecution triggered the "commercial advantage" enhancement because the offenses were allegedly done for the purpose of commercial advantage or private financial gain. (R1-95).

After a seven day trial the district court judge took pending motions for judgment of acquittal under advisement. On 22 May 2001, the jury returned verdicts of guilty on all eight counts charged. (R3-Minutes). The Petitioners timely filed motions for new trial. (R1-161, 165). On 14 September 2001, the district court judge entered his order which denied the motions for new trial but granted judgments of acquittal. (R3-181).

In his order granting the post-verdict judgment of acquittal,

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[3]References to the Record on Appeal in the United States Court of Appeals for the Eleventh Circuit will be made by the designation "R" followed by the appropriate volume number and page number.

the district court judge held that the government had not proved the crime charged in the indictment. (A-53). The district court judge found that the government "had shifted gears" during trial, in that the government originally believed that the Petitioners were running a sweatshop. (A-53). In opening statement, the Assistant United States Attorney advised the jury that the evidence would show the Petitioners prevented the employees/aliens from having any freedom of movement, paid them extremely low wages, and under reported their own true income, as well as the revenue from both of the Petitioners' restaurants. (R5-26-28). The Petitioners did this, the prosecutor argued, for commercial advantage and their own personal financial gain. (R5-26-27).

However, at the conclusion of the trial, the district court judge held that the evidence did not establish that the Petitioners were paying substandard wages; rather, the evidence indicated that the Petitioners' wages were competitive. (A-53, 67). Moreover, the judge found that the government did not prove the Petitioners were forcing employees to work excessive hours nor did the government prove that the Petitioners attempted to gain control or prevent the

departure of any individuals in the case. (A-53). Ultimately the judge ruled that the "commercial advantage" enhancement was intended for smuggling rings and sweatshop operators. (A-66). The judge stated that the Petitioners "are not either of those." (A-66). The judge concluded that allowing mere employment to trigger the "commercial advantage" enhancement would cause "absurd results." (A-65).

Accordingly, although the judge reasoned that the Petitioners probably committed two uncharged crimes: (1) knowingly hiring people without checking their credentials as required under the employer provisions of § 1324a or (2) harboring illegal aliens by giving them shelter while knowing of their illegal status under § 1324(a)(1)(B)(ii), the government had not proven that the Petitioners committed the crime charged in the indictment – harboring for commercial advantage or personal financial gain. (A-57). Hence, the judge granted the Petitioners' motion for judgment of acquittal.

The government appealed the district court judge's order. (R1-187). On appeal, the Eleventh Circuit reversed the judgment of acquittal. First, the Eleventh Circuit held that § 1324a was not the

exclusive remedy against employers. *See Zheng*, 306 F.3d at 1085; (A-12-13). Next, relying on Webster's Third New International Dictionary, the Eleventh Circuit defined for the first time the statutory terms "commercial advantage" and "private financial gain." *See id.* at 1086; (A-14-15). Using the "plain language" of § 1324, the Eleventh Circuit concluded that the "commercial advantage" enhancement could be imposed on the Petitioners for merely providing housing and transportation incidental to the employment of aliens. *See id.*; (A-15-16). Finally, the Eleventh Circuit considered the legislative history of § 1324 and concluded that Congress intended the "commercial advantage" enhancement to apply to mere employers. *See id.* at 1086; (A-18).

H. REASONS FOR GRANTING THE WRIT

1. The Questions Presented are Important.

Since the inception of 8 U.S.C. § 1324, Congress has been hesitant to impose criminal sanctions on employers of illegal aliens. Proposals to increase the criminal liability of employers have been repeatedly defeated. In fact, employer criminal sanctions are contained in a separate statute, 8 U.S.C. § 1324a, and are reserved

only for those employers that demonstrate a "pattern and practice" of illegal conduct. 8 U.S.C. § 1324a(f)(1). The decision of the Eleventh Circuit Court of Appeals, which would apply the "commercial advantage" enhancement of 8 U.S.C. § 1324(a)((1)(B)(i) to "mere employment," improperly subjects thousands of American employers to aggravated criminal liability.[4]

"According to INS, there are currently 4.5 million illegal aliens in the United States." 142 Cong. Rec. H11054-02, 11069 (1996) (statement from the debate on the floor of the House of Representatives by Congressman Riggs regarding House Resolution 2202, a precursor to the Illegal Immigration Reform and Immigrant Responsibility Act of 1996).[5] "[T]he illegal alien population increases by more than 300,000 every year." *Id.* "At least 100,000

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[4] One case of particular importance is *United States v. Tyson Foods, Inc.*, No. 01-CR-61-ALL, which is currently pending in the United States District Court for the Eastern District of Tennessee. Tyson Foods is charged with, among other things, the "commercial advantage" enhancement of § 1324(a)(2)(B)(ii).

[5] More recent data indicates that the number of undocumented immigrants exceeds eight million. *See* Karen Fleshman, *Abrazando Mexicanos: The United States Should Recognize Mexican Workers' Contributions to Its Economy By Allowing Them To Work Legally*, 18 N.Y.L. Sch. J. Hum. Rts. 237, 255 (2002) (citing information complied pursuant to the 2000 Census). For instance, the National Population Council of Mexico predicts that close to 500,000 Mexicans will migrate to the United States each year for the next thirty years. *See id.*

foreign workers overstay their visas each year." *Id.* at 11068 (statement by Congressman Conyers). In the farming industry alone, the United States General Accounting Office estimated that there were 600,000 undocumented farm workers in the United States in 1996. *See* Karen Fleshman, *Abrazando Mexicanos: The United States Should Recognize Mexican Workers' Contributions to Its Economy By Allowing Them To Work Legally*, 18 N.Y.L. Sch. J. Hum. Rts. 237, 243 (2002). Several authorities acknowledge that "the employment of undocumented immigrants is widespread." *Id.* at 250 (citing a memorandum issued by then INS Acting Associate Commissioner Paul Virtue in 1997). As the district court judge below concluded, there is inevitable sheltering[6] ...

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[6] A question exists as to whether the terms "sheltering" and "harboring" are synonymous for purposes of § 1324. Courts have struggled with defining the term "harbor" in the context of immigration. In *United States v. Evans*, 333 U.S. 483 (1948), the Court attempted to construe the predecessor of § 1324(a)(1)(C) but was unable to determine whether "conceal" and "harbor" have meanings distinct from each other, *id.* at 488, or whether "harboring" might include activities such as those of an innkeeper. *Id.* at 489-90. Courts have articulated at least four different definitions of "harboring": (1) "to clandestinely shelter, succor and protect," *Susnjar v. United States*, 27 F.2d 223, 227 (6th Cir. 1928); (2) "that [aliens] be sheltered from immigration authorities and shielded from observation to prevent their discovery as aliens," *United States v. Smith*, 112 F.2d 83, 85 (2d Cir.1940); (3) "conduct tending to substantially facilitate an alien's remaining in the United States illegally," *United States v. Lopez*, 521 F.3d 437, 441 (2d Cir. 1975); and (4) "afford shelter to," *United States v. Acosta de Evans*, 531 F.2d 428, 430 (9th Cir. 1976).

and transportation[7] that accompanies the employment of these aliens. (A-64).

Without question, some employers – specifically sweatshop operators[8] – harbor and transport employees/illegal aliens in order to prevent the aliens from being detected and, more importantly, in order to profit off of the aliens' illegal status. These employers/sweatshop operators receive a direct "commercial

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[7]There is a difference between transportation of illegal aliens that is incident to mere employment and transportation of aliens pursuant to a smuggling operation. "[H]elping undocumented persons travel within the United States was more widely practiced than smuggling." Gregory A. Loken & Lisa R. Babino, *Harboring, Sanctuary and the Crime of Charity Under Federal Immigration Law*, 28 Harv. C.R.-C.L. L. Rev. 119, 131 (1993) (discussing the Sanctuary Movement of the 1980's). "Refugees who found a way to cross the international border needed transportation to reach the sanctuary churches of Tucson and beyond." *Id.* "These transportation services, labeled "evasion services," were actions taken primarily to frustrate the efforts of authorities to capture unprocessed refuges." *Id.*

[8]The term sweatshop is "a business that regularly violates both wage or child labor laws and safety or health regulations." Charles R. Chaiyarachta, *El Monte is the Promised Land: Why Do Asian Immigrants Continue to Risk Their Lives To Work For Substandard Wages and Conditions?*, 19 Lou. L.A. Int'l & Comp. L. Rev. 173, 174 (1996). As an example, an investigation into a garment sweatshop in El Monte, California, revealed that the workers labored an average of 115 hours a week and were paid 69 cents an hour. *See* Chaiyarachta at 175. The El Monte factory was a seven-unit apartment complex surrounded by razor wire fences to prevent escape. *See id.* The building had no air conditioning or windows and as many as sixteen workers shared a bedroom. *See id.* at 175-76. The workers in the El Monte sweatshop were recruited out of Thailand by a smuggling ring. *See id.* at 176. The smuggling ring received $5000 in exchange for bringing the aliens into the United States. *See id.* The workers satisfied this debt by working in the factory. *See id.* The workers kept quiet about their abusive working conditions because of threats to report them to INS. *See id.* The factory also contained armed guards. *See id.* at 177.

advantage" and "private financial gain" from harboring, transporting, and employing these illegal aliens.

However, a distinction must be made between sweatshop operators and average employers – employers that merely house or transport aliens incident to the employment of the aliens. The latter do not offer lower wages or harsh working conditions or in any way distinguish the treatment of employees as a result of their illegal status. The decision of the Eleventh Circuit makes no such distinction.

The disparity that will be created by the Eleventh Circuit's decision is readily apparent upon examining § 1324 and § 1324a. The "commercial advantage" enhancement found in § 1324(a)(1)(B)(i) contains a ten year prison sentence. In contrast, the criminal sanction for employers found in § 1324a(f)(1) contains only a *six month* prison sentence. Moreover, § 1324a(f)(1) only applies to employers who engage in a pattern and practice of employing illegal aliens. Pursuant to the decision of the Eleventh Circuit, an employer who, *just one time*, houses or transports an illegal alien incident to employment will be subject to ten year prison sentence

– twenty times the punishment received by an employer who has engaged in a pattern and practice of employing illegal aliens. Logic dictates that Congress did not intend such a disparate result.

The holding of the Eleventh Circuit has ramifications for all of America's employers who employ the millions of illegal aliens presently living and working in the United States. Due to the significance of the question presented and the impact that the Eleventh Circuit's decision will have on employers nationwide, the Petitioners respectfully request the Court to grant the petition.

2. The Decision of the Court of Appeals is Erroneous.

The Eleventh Circuit erroneously held that mere employment is sufficient to satisfy the "commercial advantage" enhancement. The holding of the Eleventh Circuit completely ignores the clear intent of Congress in adding the enhancement to 8 U.S.C. § 1324. As evidenced by the title of the amendment, the enhancement was included to "Increase[] Criminal Penalties for Alien Smuggling." Pub. L. No. 104-208, 110 Stat. 309 (§ 203 of Division C of the Omnibus Appropriations Act of 1996). Mere employment of an

illegal alien was not the "commercial advantage" or the "private financial gain" that Congress was targeting when it added the enhancement in 1996.

The statute in effect at the time that the Petitioners were charged contained four degrees of punishment. The default maximum punishment was set at five years's imprisonment for a simple harboring violation. *See* 8 U.S.C. § 1324(a)(1)(B)(ii). The statute also provided three enhancements: (1) ten years' imprisonment if the violation was for "commercial advantage" or "private financial gain." *see* 8 U.S.C. § 1324(a)(1)(B)(i); (2) twenty years' imprisonment if the violation caused serious bodily injury, *see* 8 U.S.C. § 1324(a)(1)(B)(iii); and (3) death or life imprisonment if the violation resulted in the death of any person. *See* 8 U.S.C. § 1324(a)(1)(B)(iv). The evidence in the Petitioners' case may have established a simple harboring violation subjecting the Petitioners to a maximum punishment of five years' imprisonment, but as the district court judge correctly reasoned, mere employment is not akin to serious bodily injury or death and certainly Congress did not intend to group mere employment with these other aggravating

factors. Rather, a review of the legislative history reveals that the "commercial advantage" enhancement was meant to be applied to offenses where the violator received a commercial advantage or financial gain directly related to the alien's illegal status (i.e., smuggling rings and sweatshop operators).[9]

In 1952 Congress enacted the McCarran-Walter Act, more commonly known as the Immigration and Nationality Act (INA), which, among other things, imposed penalties for harboring an illegal alien. *See* Pub. L. No. 82-414 (1952). Congressman Celler, the chairman of the Judiciary Committee that passed the INA of 1952, stated the following during the debate of the legislation:

> I do not wish to center an attack on anybody except the smuggler and the man who tries to make money out of the misery of some workers. That is what I want to get after. Certainly we do not want to get after the good people. It is the bad at whom we aim our shafts.

98 Cong. Rec. 1347 (1952). In response to concerns that the new

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[9]"Alien smuggling is a very lucrative international business – law enforcement estimates it brings in $3 billion a year for smugglers." 142 Cong. Rec. S4063-03 (1996) (statement by Senator Feinstein). As explained in this petition, the "commercial advantage" enhancement was intended to curb smuggling rings and sweatshop operators.

statute would burden employers, Congressman Cellar reassured that the purpose of the bill was to punish "malefactors . . . who exploit and oppress these illegals." *Id.* at 1346. "Congress clearly targeted for penalty primarily that conduct which was intended to prevent the detention of an alien." Gregory A. Loken & Lisa R. Babino, *Harboring, Sanctuary and the Crime of Charity Under Federal Immigration Law*, 28 Harv. C.R.-C.L. L. Rev. 119, 153 (1993). Consistent with Congressman Cellar's reasoning, Congress added the "Texas Proviso" to the INA of 1952, which specifically excluded the employment of illegal aliens from its reach: "for the purposes of this section, employment (including the usual and normal practices incident to employment) shall not be deemed to constitute harboring." 8 U.S.C. § 1324(a)(3) (1982) (repealed 1986); *see also* Loken & Babino, *supra*, at 151 & 164 ("All sides agreed that employment of aliens is not the same thing as harboring them, a fact that appears to have escaped the attention of several federal courts later engaged in attempting to understand the meaning of the proviso.") (footnote omitted).

In subsequent years, as the illegal alien problem persisted,

Congress was forced to readdress its previous grant of immunity to employers. "[A]s long as job opportunities are available to undocumented aliens, the intense pressure to surreptitiously enter this country . . . in order to obtain employment will continue." (A-62) (citing Pub. L. No. 99-603 (1986)). In 1986, Congress enacted the Immigration Reform and Control Act (IRCA), which, for the first time, subjected employers who employ illegal aliens to criminal liability. To achieve this purpose, Congress created a completely separate statute – § 1324a – which dealt exclusively with employer sanctions. At the same time, Congress deleted the "Texas Proviso" from § 1324, thereby eliminating the employer exemption previously contained in the Act.

Despite these changes, an examination of § 1324a demonstrates that Congress intended to continue to afford a great deal of leeway to employers. For example, § 1324a(b)(6) provides for a "good faith" affirmative defense for employers that have adhered to all of the paperwork requirements. § 1324a also imposed a graduated punishment scheme, beginning with mere citations, escalating to civil fines, and finally culminating with criminal

penalties only after evidence of a "pattern and practice of violations." 8 U.S.C. § 1324a(e)(4) & (f). It is significant that the legislative history does not contain a single reference indicating that Congress intended the harboring provisions of § 1324 to apply to employers. In fact, shortly after the IRCA of 1986, the Immigration and Naturalization Service (INS) expressly stated that "employment of illegal aliens in and of itself does not constitute harboring under Section 274(a) of the Act as amended." 52 Fed. Reg. 16217 (1987). "That the I.N.S. did not except live-in employment from its concession regarding the scope of "harboring" liability is further evidence that mere sheltering, detached from any motive to prevent detection of undocumenteds by the I.N.S., is excluded from the current reach of Section 1324(a)(1)(C)." Loken & Babino, *supra*, at 165 (footnote omitted). "As federal law clearly contemplates, provision of shelter may be an ordinary and necessary part of employment." *Id.* "Attempting to separate non-harboring employment from harboring shelter would introduce Byzantine complexity and unfairness into enforcement of the employment

sanctions." *Id.*[10]

In 1996, Congress passed the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA). One of the aims of the IIRIRA of 1996 was to "increas[e] penalties for alien smuggling." H.R. Conf. Rep. 104-828 at *2 (House Report on Illegal Immigration Reform and Immigrant Responsibility Act of 1996).[11] Pursuant to this goal, Congress passed section 203 of the IIRIRA, which contained the "commercial advantage" enhancement found in 8 U.S.C. § 1324(a)(1)(B)(i). Consistent with the purpose of the Act, section 203 was specifically entitled "Increased Criminal Penalties for Alien Smuggling." *Id.*

In the opinion below, the Eleventh Circuit held that "the

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[10]Any other interpretation would lead to absurd results. For example, the shopkeeper employing an undocumented person by day would be subject to civil penalties only for a first violation, but a householder who hired that person for live-in child care would be a felon. *See* Loken & Babino, *supra*, at 165 n.279.

[11]House Conference Report Number 104-828 provided the following reasons for implementing the IIRIRA: "to improve deterrence of illegal immigration to the United States by increasing border patrol and investigative personnel, by increasing penalties for alien smuggling and for document fraud, by reforming exclusion and deportation law and procedures, by improving the verification system for the eligibility for employment, and through other measures, to reform the legal immigration system and facilitate legal entries into the United States." H.R. Conf. Rep. 104-828.

evolution of the statute to its present form indicates that Congress intended for this statute to cover employers such as the [Petitioners]." *Zheng*, 306 F.3d at 1087; (A-17). Without citing any support for its contention, the Eleventh Circuit stated that Congress "chose to penalize employers for hiring illegal aliens and harboring them from detection by providing transportation and housing for them." *Id.;* (A-18). Contrary to the conclusion of Eleventh Circuit, the legislative history of the IIRIRA of 1996, in particular the comments made by members of Congress during the debate of the Act, demonstrates that Congress specifically intended the "commercial advantage" enhancement to cover smuggling rings and sweatshop operators (i.e., those who reap a direct benefit from harboring and transporting illegal aliens due to the illegal status of the aliens).

The legislative history of the IIRIRA of 1996 contains only a few references to the purpose of the "commercial advantage" enhancement.[12] Nowhere in the legislative history is there any

[12]The Illegal Immigration Reform and Immigrant Responsibility Act was ultimately passed as part of the Omnibus Appropriations Act for Fiscal Year 1997. *See* Pub. L. No. 104-208. The two precursor bills to the Act were House

indication, either explicit or implicit, that Congress intended to impose the "commercial advantage" enhancement on employers who incidentally house or transport their employers. Rather, the focus of Congress was on curbing smuggling activities and sweatshop operators. Senators Paul Simon, Ted Kennedy, and Patrick Leahy stated the following:

> There is unanimous agreement that under the current law, the penalties for all types of immigration offenses - alien smuggling, document fraud, and sweatshop offenses are simply too weak, and do not adequately deter or punish these offenses. As a result, the bill establishes a tough, carefully calibrated sentencing scheme for these offenses. . . .
>
> . . . .
>
> Alien smuggling and involuntary servitude frequently go hand in hand, as aliens are smuggled into the country and then put to work in sweatshop conditions at slave wages in order to pay off the massive debt. This exploitation of aliens by

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Resolution 2202 and Senate Bill 1664. Senate Bill 1664 did not contain any language regarding the "commercial advantage" enhancement but did propose to amend chapter 77 of 18 U.S.C. to increase the penalties for involuntary servitude from a maximum of five years' imprisonment to a maximum of ten years' imprisonment. House Resolution 2202 originally did not contain a proposed amendment to chapter 77 of Title 18 but did contain the "commercial advantage" enhancement. Most of Senate Bill 1664 was adopted into House Resolution 2202 and the final version of 2202 included both the "commercial advantage" enhancement and the amendment to chapter 77 of Title 18. A modified version of House Resolution was eventually passed by Congress and signed by the President.

> unscrupulous sweatshop operators is on the rise, as tragic cases have documented in New York City and Los Angeles. *The bill recognizes this sad reality, and doubles the statutory penalties for sweatshop operators.*

S. Rep. 104-249 at 56 (emphasis added).

An initial version of the IIRIRA of 1996 would have added more stringent criminal and civil penalties for employers that hired illegal aliens. Senator Orin Hatch expressed his hesitance to further penalize employers for merely employing illegal aliens:

> I am gratified that the committee supported my amendment to strike increases in civil and criminal penalties against employers for violations of the sanctions provisions under current law. . . .
>
> About 10 years ago, Congress enacted what was described as a key component of a program to control illegal immigration, making it illegal for employers to hire knowingly persons unauthorized to work in the United States.
>
> This employer sanctions regime is well-intentioned. In my view, however, the employer sanctions regime is mistaken. While I have in the past supported an outright repeal, the intent of my amendment and those amendments offered by Senator Kyl was simply to ensure that this bill does not make the current situation worse.
>
> First, *I do not believe we should, in effect, convert our nation's employers into guardians of our borders* – that is a job for the Border Patrol and the INS. . . .
>
> . . . .

> *The problem with employer sanctions is not in the details, it is in the very concept. We should resist the notion that they need to be "tightened up" or "made tougher."* All we will achieve is placing more burdens on business.
>
> Finally, the bill retains significant increases for personnel directed to investigate and prosecute employers for sanctions violations. I remain concerned about those increases. *These new investigators and prosecutors, in my view, should be dedicated to going after smugglers and document fraud, not American employers.*

S. REP. 104-249, 37-39 (emphasis added).

Consistent with Senator Hatch's concerns, the more stringent employer sanctions were deleted from the final version of the IIRIRA of 1996 that was passed by Congress. As a result, several Congressman expressed dissatisfaction that the Act did not do enough to penalize employers of illegal aliens. Congressman Dingell complained that "this bill lessens the penalties against those who skip over American workers to hire foreign workers." 142 Cong. Rec. H11054-02, 11064. Congressman Durbin exclaimed:

> [T]he bill that was passed by the House retained civil penalties for employers who knowingly hire illegal immigrants. But the conference reports [sic] which is now before the House removes the civil penalties against employers who knowingly hire illegal immigrants, which will make it easier for

> unscrupulous employers to hire illegal immigrants and put Americans out of work.

Id. at 11065. Congressman Conyers noted that "[t]his bill says no to more civil penalties for abusive employers who hire the illegals." *Id.* at 11068. Finally, Congressman Kleczka stated:

> This bad conference report, in fact, weakens sanctions against employers who knowingly hire illegal immigrants. If we are serious about curbing illegal immigration, it is simply illogical to pass legislation that is soft on these law-breaking employers.

Id. at 11069. Clearly the same Congress that "weaken[ed] penalties and was "soft on . . . law-breaking employers" did not, at the same time, intend to impose strict felony criminal sanctions on employers who incidentally house or transport illegal aliens in the course of employment. The legislative history of the 1996 Act is quite simply contrary to the Eleventh Circuit's statement that "Congress intended § 1324 to cover employers such as the [Petitioners]." *Zheng*, 306 F.3d at 1087; (A-18).

Other than the Eleventh Circuit,[13] no court has applied the

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[13]In the decision below, the Eleventh Circuit relied on the decision of the Second Circuit Court of Appeals in *United States v. Kim*, 193 F.3d 567 (2d Cir. 1999). *Kim*, however, is distinguishable from the Petitioners' case. First, as the

"commercial advantage" enhancement to mere employment. *See, e.g., United States v. Yoshida,* 303 F.3d 1145, 1152 (9th Cir. 2002) (affirming defendant's conviction for encouraging and inducing an aliens to enter the U.S. for commercial advantage based on evidence that the aliens paid $50,000 to the smuggling operation)[14]; *United States v. Angwin*, 271 F.3d 786, 805 (9th Cir. 2001) (holding that

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district court judge below concluded, "it is probable that even the *Kim* case involved a sweatshop." (A-60 n.6). Second, the defendant in *Kim* was not charged with the ten-year enhancement under § 1324(a)(1)(B)(i); rather, the Second Circuit only considered whether the "other than for profit" sentencing enhancement applied to Mr. Kim. It is significant, however, that the sentencing guidelines lend further support to the Petitioners' contention that the "commercial advantage" enhancement must be directly related to the "illegal" status of the alien. The guidelines provide for a sentencing enhancement "[i]f the defendant committed the offense other than for profit." Guidelines § 2L1.1(b)(1) (2002). The commentary states that "'other than for profit' means that there was no payment or expectation of payment" *for the smuggling, transporting, or harboring of any of the unlawful aliens.*" Guidelines § 2L1.1(b)(1) (Application Note 1) (2002) (emphasis added).

[14]In determining that the defendant's only motivation for encouraging or inducing the aliens to enter the United States was for commercial advantage, the Ninth Circuit in *Yoshida* stated that the defendant, "as a stranger to the aliens, had no benevolent reason to lead them into the United States." 303 F.3d at 1152. In contrast, there is no indication in the record in the Petitioners' case that the Petitioners received any commercial advantage for providing housing or transportation to the illegal alien employees. The only commercial advantage received was related to employment, but this advantage had nothing to do with the aliens' illegal status and was the same advantage that the Petitioners received from their employment of legal aliens. Finally, contrary to *Yoshida*, several of the aliens that were provided housing and transportation were family members of the Petitioners. Contrary to the conclusion of the Eleventh Circuit, *see Zheng*, 306 F.3d at 1086, (A-15), it seems that as a result of being employees, the aliens were extended free housing and transportation, and the justification arguably was benevolence.

evidence supported defendant Angwin's conviction for aiding and abetting the bringing in of illegal aliens for financial gain based on alien's testimony that he would have to pay for his transportation across the border); *United States v. Dixon*, 201 F.3d 1223, 1228 (9th Cir. 2000) (affirming defendant's conviction for bringing in an alien for commercial advantage based on evidence that defendant agreed to smuggle the aliens across the border in exchange for future payment). Based on the overwhelming consensus of other circuits, the district court judge below was correct in limiting the enhancement to "the professional smuggler or the professional sweatshop owner." (A-60).

The decision of the Fourth Circuit in *United States v. Bonetti*, 277 F.2d 441 (4th Cir. 2002), is a classic example of a case involving harboring for commercial advantage. In *Bonetti*, the defendant and his wife moved to the United States from Brazil in 1979 and brought Hilda Rosa Dos Santos with them to be their domestic servant. Although Dos Santos initially obtained a visa, it expired in 1984. "Dos Santos worked for the Bonettis in slavery-like conditions." *Id.* at 444. "Dos Santos performed arduous labor for

many hours a day, never receiving payment for her work." *Id.* "In addition, her living conditions were deplorable . . . ." *Id.* Although there were many empty rooms in defendant's expensive house, "Dos Santos was forced to live in a basement room with no windows or bathroom." *Id.* The defendant was ultimately convicted of, among other crimes, harboring an alien for commercial advantage or private financial gain.

As the district court judge concluded, the Petitioners are neither smugglers of aliens nor sweatshop operators. Rather, the Petitioners own a family restaurant, which happened to employ both legal and illegal aliens. In contrast to the slave-like conditions described in *Bonetti*, the district court below found that the aliens housed and transported by the Petitioners did not experience any harsh treatment:

> The government did not show that defendants saved money, paid lower wages, or made increased revenues due to the fact that these individuals were illegal. That is, while it is obvious that these employees helped the business succeed by simply being there to put the food out, serve customers, etc., – as would any employees, legal or illegal – there is no evidence that defendants received a benefit specifically tied to their illegal status. The

> evidence, viewed most favorably to the government, showed that the illegal aliens were paid the same as the legal aliens and that the wages paid simply were not low, averaging over $4.00 per hour, not counting tips and the free room board and transportation the individuals received.

(A-66-67). Significantly, the district court judge concluded that the government failed to prove that the Petitioners "received any gain from the fact that the individuals were illegal." (A-67). § 1324(a)(1)(B)(i) requires that the offense (harboring illegal aliens) be "done for the purpose of commercial gain or private financial gain." The district court judge correctly determined that § 1324(a)(1)(B)(i) requires the government to prove that the defendants "targeted illegal aliens for sheltering and employment because doing so conveyed a commercial advantage or private gain to them over targeting other people for sheltering and employment." (A-67-68). The fact that some of the aliens that worked for Petitioners were *illegal* was irrelevant to the Petitioners' commercial advantage or private financial gain. Congress' purpose in adding the "commercial advantage" enhancement to § 1324 was to curb alien smuggling. Imposing the enhancement on the Petitioners will not

further this purpose.

Finally, the decision of the Eleventh Circuit is in conflict with the Court's decision in *Keller v. United States*, 213 U.S. 138 (1909). In *Keller*, the defendants were convicted for keeping an alien woman for the purpose of prostitution. The Congressional Act that was the basis for the conviction provided:

> [W]hoever shall keep, maintain, control, support, or harbor in any house or other place, for the purpose of prostitution or for any other immoral purpose, any alien woman or girl, within three years after she shall have entered the United States, shall, in every such case, be deemed guilty of a felony, and on conviction thereof, be imprisoned not more than five years, and pay a fine of not more than five thousand dollars.

213 U.S. at 139. The Court reversed the convictions and held that the Act was unconstitutional. The Court reasoned that although Congress had the authority to regulate activity associated with the illegal importation of aliens, Congress did not have the authority to regulate "all dealings of our citizens with resident aliens," such as merely "furnish[ing] a place" to one. *Id.* at 144, 148. The *Keller* decision supports the Petitioners' contention that the "commercial advantage" enhancement only applies to conduct that is sufficiently

related to "the importation of" an alien. *Id.* at 147. *See* Loken & Babino, *supra*, at 158 ("[An] attempt to detach harboring from both smuggling and physical concealment fail[s] to account for the one branch in the pedigree of the anti-harboring statute not overtly discussed by Congress in 1952: the Supreme Court's holding in *Keller v. United States* that an anti-harboring provision aimed at someone who 'only furnished a place' for an alien but did not 'assist in [her] importation' was beyond Congress' immigration powers and thus unconstitutional.").

Based on the legislative history of the IIRIRA of 1996, the Court's decision in *Keller*, and the rule of lenity,[15] the district court judge's order should have been affirmed by the Eleventh Circuit. The Eleventh Circuit erred in concluding that the "commercial advantage" enhancement applies to mere employment without requiring the government to establish that the Petitioners'

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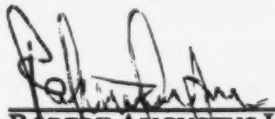
[15]"[B]ecause the governing standard is set forth in a criminal statute, it is appropriate to apply the rule of lenity in resolving any ambiguity in the ambit of the statute's coverage." basis of general declarations of policy in the statute and legislative history." *Crandon v. United States*, 494 U.S. 152, 158 (1990). "To the extent that the language or history of [a statute] is uncertain, this "time-honored interpretive guideline" serves to ensure both that there is fair warning of the boundaries of criminal conduct and that legislatures, not courts, define criminal liability. *Id.* (quoting *Liparota v. United States*, 471 U.S. 419, 427 (1985)).

commercial advantage or private financial gain was obtained as a result of the aliens' *illegal* status. Without requiring a nexus between the underlying offense and the enhancement clause, the Eleventh Circuit's decision subjects millions of American employers to enhanced penalties – a result that was never intended by Congress.

I. CONCLUSION

The Petitioners respectfully request the Court to grant the writ and correct the Eleventh Circuit's interpretation of 8 U.S.C. § 1324(a)(1)(B)(i).

Respectfully Submitted,



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Case No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 2002

CHANG QIN ZHENG, and
JIN SHUANG ZHENG,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

Appendix to
Petition for Writ of Certiorari
to the Eleventh Circuit Court of Appeals

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IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 01-15551

D. C. Docket No. 00-00038 CR-1-MMP

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

versus

CHANG QIN ZHENG,
ZHENG WEI ZHENG,
JIN SHUANG ZHENG,
a.k.a. Shuang Jin Zheng,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Florida

(September 17, 2002)

Before DUBINA, BARKETT, and KRAVITCH, Circuit Judges.

DUBINA, Circuit Judge:

A jury found Appellees Chang Qin Zheng ("Chang"), Zheng Wei Zheng ("Zheng"), and Jin Shuang Zheng, a.k.a. Shuang Jin Zheng ("Jin"), guilty of conspiring to conceal, harbor, and shield from detection aliens in buildings and motor vehicles for the purpose of commercial advantage and private financial gain, knowing and in reckless disregard of the aliens' illegal status, in violation of 8 U.S.C. § 1324(a)(1)(A)(iii), (a)(1)(A)(v)(I), and (a)(1)(B)(i). The jury also found the Appellees guilty of the substantive crimes of concealing, harboring, and shielding from detection certain named illegal aliens for commercial advantage and private financial gain, knowing and in reckless disregard of the aliens' illegal status, in violation of 8 U.S.C. § 1324(a)(1)(A)(iii), (a)(1)(A)(v)(I), and (a)(1)(B)(i). After trial, the district court granted a Motion for Judgment of Acquittal as to all Appellees. The Government appeals, and we reverse.

BACKGROUND

In 1989, Chang illegally entered the United States but became a legal permanent resident in 1995. His wife, Jin, had previously entered the United States in 1984 on a tourist visa and reported to the Immigration and Naturalization Service ("INS") as an

illegal alien. Jin became a legal permanent resident in 1996. In 1993, Jin's brother, Zheng, entered the United States with false documents. Authorities arrested Zheng, but the INS issued him an employment authorization. In 1997, the INS rescinded his employment authorization and ordered Zheng deported. Zheng, however, never left the United States.

In 2000, the Federal Bureau of Investigation ("FBI") in Gainesville, Florida, and the INS in Jacksonville, Florida, began investigating complaints that three people who were operating two Chinese restaurants in Gainesville – the China Super Buffet and the New China Restaurant – were allegedly employing illegal Chinese and Central American immigrants. The FBI and INS conducted joint surveillances from March until July 2000. In one surveillance, authorities observed ten to fifteen Asian and Hispanic individuals outside Zheng's house at 1707 South Williston Road, Gainesville, Florida. These men and women were dressed identically, wearing white shirts, black vests, and pants. In another surveillance, authorities saw approximately ten Asian and Hispanic individuals outside Zheng's house enter two vehicles, a red Plymouth registered

to Chang and a tan Honda registered to Zheng. Thirty minutes later, authorities saw these same individuals working in the China Super Buffet.

On another occasion, authorities observed ten or eleven workers arrive at the China Super Buffet in either the red Plymouth or the tan Honda. On April 28, 2000, authorities videotaped four individuals leave Chang and Jin's home in Chang's red Plymouth and drive to the China Super Buffet. Later that same day, authorities saw Zheng working the cash register at the China Super Buffet. When an officer paid for the meals, Zheng accepted the money and made change but failed to ring up the sale on the cash register.

On June 16, 2000, Alachua County Deputy Sheriff Steven Maynard ("Deputy Maynard") responded to a disturbance call at Zheng's residence. Upon arrival, Deputy Maynard observed what appeared to be two Hispanic males jump a chain link fence in the back hard of the residence and flee. Three other individuals at the residence complained to Deputy Maynard that they disputed their wages with their employers. Authorities later discovered that two of the complaining individuals were illegal aliens. Looking inside the

residence, Deputy Maynard saw between ten and twenty persons of Asian and Hispanic heritage. Deputy Maynard knocked on the door and Zheng appeared. Zheng admitted to Deputy Maynard that he was an illegal alien and stated that he was the manager of the Super China Buffet.

Chang, Jin, and their two children arrived shortly thereafter at Zheng's residence. Chang and Jin escorted Deputy Maynard around the house and explained that they employed the occupants of the house at their restaurants. Deputy Maynard noticed that some of the rooms were sparsely furnished with barrack-like accommodations. Several of the occupants admitted to Deputy Maynard that they were illegal aliens. In addition, Chang admitted to Deputy Maynard that he knew that some of his employees were illegal aliens.[16]

On July 27, 2000, investigators executed search warrants at the China Super Buffet, the New China Restaurant, and at the Appellees' residences. Investigators located one illegal alien in

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[16]Chang cannot speak English, but his son, who does speak English, interpreted his father's words to Deputy Maynard.

Zheng's home and recovered numerous business documents, including invoices for both restaurants, billing records, blueprints, and a contractor's estimate for renovations to the China Super Buffet. Investigators also recovered fifteen to twenty credit cards in Zheng's name and a total of $13,585 in cash in the trunk of his Honda. At Chang and Jin's home, investigators recovered various documents and located one illegal alien. At the two restaurants, the investigators recovered business records, financial records, cash, illegal aliens, business cards, and an INS order directing Zheng to report for deportation on May 10, 2000. Investigators discovered that eighteen of the twenty-two employees at the restaurants were illegal aliens.

Investigators presented the evidence to the Government, who then charged the appellees with violating 8 U.S.C. § 1324(a)(1)(A)(iii), (a)(1)(A)(v)(I), (a)(1)(A)(v)(II) and (a)(1)(B)(i). At trial, various employees testified about their working and living arrangements. These employees stated that they lived in Zheng's house without paying rent and that they worked at the restaurants, on average, twelve hours a day, six days a week. Most of the

restaurants' employees, if not all, lacked proper authorization documents. Some employees testified that Chang and Zheng never requested to see identifying information. Additionally, the employees testified that Chang and Zheng paid them in cash, an average monthly salary between $900 and $1900. The Government also proffered evidence showing that the Appellees failed to pay Social Security and federal taxes for these employees, either from the employees' earnings or from the required employer payments. Further, the Appellees failed to make unemployment compensation payments required under Florida state law. The Government also proved that Appellees infrequently filed tax returns and when they did file, they greatly under-reported the number of employees, the amount of wages paid to employees, their personal income, and their business income. Despite failing to pay their taxes, Appellees wired more than $200,000 in cash to China.

ISSUES

1. Whether the district court erred in granting the Appellees' Motion for Judgment of Acquittal after the jury found the Appellees guilty of violating 8 U.S.C. § 1324(a)(1)(A)(iii),

(a)(1)(A)(v)(I), (a)(1)(A)(v)(II), (a)(1)(B)(i).

2. Whether the district court erred by failing to enter a judgment of conviction on the lesser included offense proscribed in 8 U.S.C. § 1324(a)(1)(A)(iii), (a)(1)(B)(ii).[17]

STANDARD OF REVIEW

This court applies "the same standard used in reviewing the sufficiency of the evidence" to a district court's grant of a Judgment of Acquittal. *United States v. Ward*, 197 F.3d 1076, 1079 (11th Cir. 1999). This court does not defer to the district court's decision, but views the evidence in the light most favorable to the Government, resolving any conflicts in the evidence in favor of the Government. *Id.* "The court must ascertain whether a reasonable jury could have found the defendant guilty beyond a reasonable doubt." *Id.*

DISCUSSION

The Government charged the Appellees with various violation of 8 U.S.C. § 1324(a)(1)(B)(i). Section 1324 provides, in

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[17]Because we reverse the district court's order granting Judgments of Acquittal and reinstate the Appellees' convictions, we decline to discuss the issue.

pertinent part:

§ 1324. Bringing in and harboring certain aliens

(a) Criminal penalties

(1)(A) Any person who –

(i) knowing that a person is an alien, brings to our attempts to bring to the United States in any manner whatsoever such person at a place other than a designated port of entry or place other than as received prior official authorization to come to, enter, or reside in the United States and regardless of any future official action which may be taken with respect to such alien;

(ii) knowing or in reckless disregard of the fact than an alien has come to, entered, or remains in the United States in violation of law, transports, or moves or attempts to transport or move such alien within the United States by means of transportation or otherwise, in furtherance of such violation of law;

(iii) knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the Unites States in violation of law, conceals, harbors, or shields from detection, or attempts to conceal, harbor, or shield from detection, such alien in any place, including any building or any means of transportation;

(iv) encourages or induces an alien to come to, enter, or reside in the United States, knowing or in reckless disregard of the fact that such coming to, entry, or residence is or will be in violation of law; or

(v)(I) engages in any conspiracy to commit any of the preceding acts, or

(II) aids or abets the commission of any of the preceding acts, shall be punished as provided in

> subparagraph (B).
> (B) A person who violates subparagraph (A) shall, for each alien in respect to whom such a violation occurs –
>
> (i) in the case of a violation of subparagraph (A)(i) or (v)(I) or in the case of a violation of subparagraph (A)(ii), (iii), or (iv) in which the offense was done for the purpose of commercial advantage or private financial gain, be fined under Title 18, imprisoned not more than 10 years, or both
> . . .

8 U.S.C. § 1324(a)(1)(A)(i)-(v), (a)(1)(B)(i) (1999).

In its order granting the Appellees' Judgments of Acquittal, the district court concluded that the Government failed to prove beyond a reasonable doubt that the Appellees harbored the illegal aliens for the purpose of commercial advantage or private financial gain. In reaching this conclusion, the district court evaluated the Government's evidence and considered the legislative history and the dearth of case law discussing this statute. The district court determined that the Government did not present sufficient evidence from which a rational jury could conclude beyond a reasonable doubt that the Appellees were guilty of the charged offenses. The district court further concluded that neither the legislative history nor the case law supported the Government's charges against the Appellees.

We disagree.

The Appellees contend that, at most, the Government should have charged them with § 1324a only, which imposes on the employer obligations to refrain from knowingly employing an alien who is unauthorized to work in the United States and to verify, under penalty of perjury, that before hiring a given individual, the employer examine identification documents and conclude that those documents reasonably appear to be genuine. 8. U.S.C. § 1324a(a), (b)(1). Section 1324a authorizes the Government to prosecute employers who have engaged in a pattern or practice of violating these obligations. The criminal sanctions prescribed for a violation of § 1324a are much less stringent than those prescribed for a violation of § 1324.[11]

In considering this appeal, we first examine the language of the statute at issue. "As with any question of statutory interpretation, we begin by examining the text of the statute to determine whether its meaning is clear." *Lewis v. Barnhardt*, 285 F.3d 1329, 1331 (11th

[11]Section 1324a provides a civil penalty, not to exceed $3000, for each unauthorized alien and a criminal penalty, not to exceed six months, for the entire pattern or practice of employing illegal aliens.

Cir. 2002); *see also Merritt v. Dillard Paper Co.*, 120 F.3d 1181, 1185 (11th Cir. 1997) ("In construing a statute we must begin, and often should end as well, with the language of the statute itself."). The Appellees assert that the language of § 1324 restricts its application to individuals who are in the business of smuggling illegal aliens into the United States for employment or those who employ illegal aliens in "sweatshops." We disagree. Section 1324 applies to "[a]ny person" who knowingly harbors an illegal alien. Although § 1324 and § 1324a appear to cover some of the same conduct. "The fact that Congress has enacted two sections encompassing similar conduct but prescribing different penalties does not compel a conclusion that one statute was meant to limit, repeal, or affect enforcement of the other." *United States v. Kim*, 19 F.3d 567, 573 (2d Cir. 1999). The Supreme Court has noted that statutes may "overlap" or enjoy a "partial redundancy," *United States v. Batchelder*, 442 U.S. 114, 118, 99 S.Ct. 2198, 2201, 60 L.Ed.2d 755 (1979). And yet be "fully capable of coexisting." *Id.* at 122, 99 S.Ct. at 2203. We agree with the Second Circuit's analysis of §§ 1324 and 1324a that "nothing in the language of these two sections

. . . preclude[s] their coexistence." *Kim*, 193 F.3d at 573. The plain language of § 1324 does not limit its reach to certain specific individuals, and thus, the Government properly charged the Appellees with violating this statute.

We must also examine the other pertinent language Congress used in § 1324. This section provides for a ten-year imprisonment term for any person who knowingly harbors an illegal alien for commercial advantage or private financial gain. 8 U.S.C. § 1324(a)(1)(B)(i). The statute fails to specifically define "commercial advantage" or "private financial gain," but the meanings of these terms are hardly arcane. Terms that are not statutorily defined are ascribed their "ordinary or natural meaning." *Nat'l Coal Ass'n v. Chater*, 81 F.3d 1077, 1081 (11th Cir. 1996) (per curiam) (citing *Fed. Deposit Ins. Corp. v. Meyer*, 510 U.S. 471, 476, 114 S.Ct. 996, 1001, 127 L.Ed.2d 308 (1994)); *see also United States v. Stewart*, 311 U.S. 60, 63, 61 S.Ct. 102, 105, 85 L.Ed. 40 (1940) (assuming that Congress used a word in its usual and well-settled sense). We therefore look to other sources and common sense to aid in the interpretation of these terms. *See United States v. Porter*, 591 F.2d

1048, 1053 (5th Cir. 1979).[19]

The usual meaning of "commercial" is "of, in, or relating to commerce." WEBSTER'S NEW INT'L DICTIONARY (3d ed. 1986). Commerce is defined as "the exchange or buying and selling of commodities esp. on a large scale." *Id.* The word "advantage" signifies "a more favorable or improved position or condition;" a "benefit, profit, or gain of any kind." *Id.* Thus, a common-sense understanding of "commercial advantage" is a profit or gain in money obtained through business activity.

Furthermore, we must ascribe an ordinary meaning to the phrase "private financial gain." Private is ordinarily "intended for or restricted to the use of a particular person or group or class of persons." WEBSTER'S NEW INT'L DICTIONARY. Financial is defined as "relating to finance," which in turn is defined as "the obtaining of funds or capital." *Id.* A gain is considered "an increase in or addition to what is of profit, advantage, or benefit." *Id.* Accordingly, the common meaning attributed to "private financial

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[19]In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), this court adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

gain" is an additional profit specifically for a particular person or group.

Applying a common meaning to the plain language of the terms Congress used in § 1324 to the Government's evidence presented at trial, a rational jury could conclude beyond a reasonable doubt that the Appellees harbored the illegal aliens for their private financial gain. At trial, the Government proffered evidence that the Appellees provided both employment and housing for the illegal aliens without any evidence that they did so "out of any feelings of charity or affection." *Kim*, 193 F.3d at 577. The Government showed that the Appellees harbored the illegal aliens by providing both housing and employment which facilitated the aliens' ability to remain in the United States illegally. The housing and employment prevented government authorities from detecting the illegal aliens' unlawful presence. *Kim*, 193 F.3d at 574; *see also United States v. Singh*, 261 F.3d 530 (5th Cir. 2001) (affirming a conviction for harboring illegal aliens for commercial gain where defendants employed illegal aliens in a convenience store and the aliens lived in the back of the store).

Moreover, in this case, the Appellees admitted that they obtained workers from an employment agency that specifically recruited aliens. The Government showed that the Appellees gained financially by employing those aliens and paying lower wages, on average, $4.00 an hour for ten hours each day of work. The Appellees also gained financially when they employed these aliens by failing to withhold federal taxes and Social Security payments, failing to pay unemployment taxes, failing to pay the employer's portion of Social Security payments, and wire-transferring more than $200,000 in unreported cash to China. Furthermore, the Appellees greatly under-reported the number of employees, the amount of wages paid to employees, their personal income, and their business income on their infrequently filed tax forms/returns. No doubt exists that the Appellees harbored these illegal aliens for private financial gain when they paid undocumented, unreported, and unlisted illegal aliens a total of $10,000 to $15,000 cash each month without deducting federal withholding tax, FICA, and Social Security contributions.

Although we conclude that the plain language of § 1324

supports the Government's charges, we also note that the evolution of the statute to its present form indicates that Congress intended for this statute to cover employers such as the Appellees. The foundation of § 1324 was Congress' acknowledgment that there was a severe problem with the employment of illegal aliens. In 1986, Congress passed the Immigration Control and Legalization Amendments Act, which revised 8 U.S.C. § 1324(a). Immigration Reform and Control Act of 1986 ("IRCA"), Pub.L. No. 99-603, §§ 101, 112(a), 100 Stat. 3359, 3360-74, 3381-82 (1986). IRCA was a major immigration reform initiative designed to "deter aliens from entering [the United States] illegally." H.R. Rep. No. 99-682(I), at 46 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5649, 5650. Noting that the "primary reason for the illegal alien problem is the economic imbalance between the United States and the countries from which aliens come, coupled with the chance of employment in the United States," the House Committee was of the opinion that the most reasonable approach to the problem was to make unlawful the "knowing" employment of illegal aliens. 1986 U.S.C.C.A.N. at 5656.

Later, Congress amended the Illegal Immigration Reform and Immigration Responsibility Act of 1996 ("IIRIRA"), Pub.L. 104-208, 110 Stat. 3009-565, to provide the increased penalty of ten years for a violation of § 1324(a)(1)(A)(i), (ii), (iii), or (iv) (offenses relating to alien smuggling, harboring, inducement, or transportation) done for the purpose of commercial advantage or private financial gain.

The legislative history demonstrates that Congress intended § 1324 to cover employers such as the Appellees. Congress expressly noted the pervasive problem of illegal alien employment and its harmful effect on the American worker. Each time an employer hires an illegal alien, an American citizen loses an employment opportunity. Congress understood this problem and chose to penalize employers for hiring illegal aliens and harboring them from detection by providing transportation and housing for them. In light of the Congressional purpose of this statute, the Appellees are not immune from its reach.

In conclusion, we are persuaded that the Government provided sufficient evidence from which a rational jury could conclude beyond a reasonable doubt (and did so conclude) that the

Appellees' harboring of illegal aliens was for the purpose of commercial advantage or private financial gain. Accordingly, we reverse the district court's judgments of acquittal and remand with instructions that the district court reinstate the jury's verdict.

REVERSED and REMANDED.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 01-15551-GG

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

versus

CHANG QIN ZHENG,
ZHENG WEI ZHENG,
JIN SHUANG ZHENG,
a.k.a. Shuang Jin Zheng,

Defendants-Appellees.

On Appeal from the United States District Court for the
Northern District of Florida

BEFORE: DUBINA, BARKETT and KRAVITCH, Circuit Judges.

PER CURIAM:

The petition(s) for rehearing filed by Appellees, Chang Qin Zheng, Zheng Wei Zheng and Jin Shuang Zheng is DENIED.

ENTERED FOR THE COURT:

/s/ Joel F. Dubina
UNITED STATES CIRCUIT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA GAINESVILLE DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

vs. **CASE NO. 1:00cr38 MMP**

CHANG QIN ZHENG,
ZHENG WEI ZHENG, and
JIN SHUANG ZHENG,

Defendants.

_____/

ORDER

This matter is before the Court on the following motions:

- Motion for New Trial (doc. 161) by Chang Qin Zheng
- Motion for New Trial by Zheng Wei Zheng (doc. 162)
- Motion for New Trial by Jin Shuang Zheng (doc. 165)
- Motion for Judgment of Acquittal by Jin Shuang Zheng (doc. 166)

The government has responded to all of these motions (doc. 163, 164, 167, 168, respectively). Also, during the trial, the defendants moved for judgment of acquittal and for new trial at the close of the evidence. The Court reserved judgment on these motions and allowed the parties to file the above written pleadings. Each of the defendants has adopted the arguments made by the other two defendants.

I. EVIDENCE PRESENTED AT TRIAL

The Superseding Indictment in this case charges that the defendants did "conceal, harbor, and shield from detection aliens in buildings and motor vehicles, for the purpose of commercial advantage or private financial gain, knowing and in reckless disregard of the fact that said aliens had come to, entered and remained in the United States in violation of law." Viewing the evidence presented at trial in the light most favorable to the Government, the Court finds that the evidence at trial supports the following findings. The government offered evidence that each of the aliens listed in the indictment was in fact an illegal alien and did in fact reside at the residence supplied by the defendants.

Additionally, the government offered proof that each did work in the restaurant owned by the defendants. Furthermore, the government provided evidence which a reasonable jury could believe showed that the defendants knew or were in reckless disregard of the illegal status of the individuals.

The evidence also showed, however, that the defendants did not attempt to hide the identities or location of the aliens and did not assist the aliens in coming into the country, obtaining false papers or otherwise avoiding detection. Moreover, the testimony was uniform and uncontested that the defendants employed legal as well as illegal aliens; that the illegal aliens were paid the same wages as the non-illegal aliens;[1] and that the wage was a good wage – around $4.00 per hour, not counting tips, and not counting the free food, housing and transportation the defendants provided.

Additionally, several individuals testified, and their

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[1]There was testimony that some of the Hispanic workers were discontented with the fact that some of the Asian workers were paid higher wages. The differential in wages was apparently due to race, and not to illegal alien status, however, since some of the Asians are alleged to be illegal aliens, while others were legal, and some of the Hispanics were alleged to be illegal while others were alleged to be legal.

testimony was uncontested, that the workers were free to come and go. In fact, several individuals left the employment of the restaurant to go to bigger cities to try to make more money. Some of those individuals that left discovered that they could not make better net earnings than they did with the defendants and so they returned to Gainesville and were allowed to work at defendants' restaurant again.

Thus, the Court finds that the government has not proven that the defendants were paying the illegal aliens substandard wages, has not proven that the defendants were forcing the defendants to work excessive hours, and has not proven that the defendants attempted to control the movement of and prevent the departure of any of the individuals in this case. In other words, the government has not proven that the defendants were running what can be called a sweatshop where the defendants could pay lower wages and force longer hours because the illegal aliens were afraid to complain.

Instead, the evidence showed that the defendants' primary interest was in obtaining a steady stream of employees in an industry with high employee turnover. To do this without speaking English,

they chose to use employment agencies with whom they could communicate in their native language. But the evidence shows that in doing so, the defendants harbored many of their employees while they knew or were in reckless disregard of their illegal status.

II. DISCUSSION

1. Was there an improper material variance or constructive amendment of the Superseding Indictment caused by the jury instructions?

The defendants assert that the jury instructions as written result in a material variance from what the superseding indictment (doc. 95) charges. Specifically, defendants point to the fact that the superseding indictment charges in the conjunctive while the jury instructions require proof only in the disjunctive.

Count One of the Superseding Indictment charges that all three defendants conspired to violate 8 U.S.C. § 1324(a)(1)(A)(iii) by agreeing to

> conceal, harbor, and shield from detection aliens in buildings and motor vehicles, for the purpose of commercial advantage or private financial gain, knowing and in reckless disregard of the fact that said aliens had come to, entered and remained in the United States in violation of law

Counts Two, Three, Five, Six, Seven and Eight each charge all three defendants with violating 8 U.S.C. § 1324(a)(1)(A)(iii) and 1324 (a)(1)(B)(i). Each count involves a particular individual and alleges that

> knowing and in reckless disregard of the fact that an alien, namely [the name of the particular individual], had come to, entered and remained in the Unites [sic] States in violation of law, knowingly did conceal, harbor and shield from detection such alien in a building located at 1707 S.W. Williston Road, Gainesville, Florida, for the purpose of commercial advantage and private financial gain, in violation of Title 8, United States Code, Sections 1324(a)(1)(A)(iii), (a)(1)(v)(II) [sic], and (a)(1)(B)(i).

Count Four contains the same language but charges only two of the defendants, Chang Qin Zheng and Jin Shuang Zheng with committing the above offense with regard to the third defendant, Zheng Wei Zheng at a building located at 1900 S.W. 13th St., in Gainesville, Florida.

The statute under which they are charged in relevant part states:

§ 1324 Bringing in and harboring certain aliens

(a) Criminal penalties

(1) (A) Any person who

. . . .

(iii) knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, conceals, harbors, or shields from detection, or attempts to conceal, harbor, or shield from detection, such alien in any place, including any building or any means of transportation;

. . . .

shall be punished as provided in subparagraph (B).

(B) A person who violates subparagraph (A) shall, for each alien in respect to whom such a violation occurs –

(i) in the case of a violation of subparagraph (A)(i) or (v)(I) or in the case of a violation of subparagraph (A)(ii), (iii), or (iv) in which the offense was done for the purpose of commercial advantage or private financial gain, be fined under Title 18, imprisoned not more than 10 years, or both;

(ii) in the case of a violation of subparagraph (A)(ii), (iii), (iv), or (v)(II), be fined under Title 18, imprisoned not more than 5 years, or both;

(iii) in the case of a violation of subparagraph (A)(i), (ii), (iii), (iv), or (v) during and in relation to which the person causes serious bodily injury (as defined in section 1365 of Title 18) to, or places in jeopardy the life of, any person, be fined under Title 18, imprisoned not more than 20 years, or both; and

(iv) in the case of a violation of subparagraph (A)(i), (ii),

(iii), (iv), or (v) resulting in the death of any person, be punished by death or imprisoned for any term of years or for life, fined under Title 18, or both.

8 U.S.C. § 1324.

The statute uses the disjunctive in three situations where the indictment uses the conjunctive. First, the statute allows conviction if the defendant acts "knowing *or* in reckless disregard" of an alien's illegal status. The indictment charges that the defendants acted "knowing *and* in reckless disregard."[2] Second, the statute describes what facts the defendants need to know or recklessly disregard. The defendant must know or recklessly disregard the fact that an alien "has come to, entered, *or* remains in the United States in violation of law." The superseding indictment charges that the defendants knew and recklessly disregarded the fact that the aliens "had come to, entered, *and* remained in the United States in violation of law." The third conjunctive/disjunctive switch involves the acts which defendants must commit to face conviction. The statute allows conviction if the defendant "conceals, harbors, *or* shields from

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[2]The emphasis on the "or" and "and" throughout this paragraph was supplied in the instant document and is not found in the actual statute or superseding indictment.

detection, or attempts to conceal, harbor, *or* shield from detection" such aliens. Again, the superseding indictment uses the conjunctive and charges that defendants agreed to, and actually did, "conceal, harbor, *and* shield from detection" the particular alien or aliens involved in each count.

In the jury instructions (doc. 155), however, the Court instructed the jury in the disjunctive. For example, on page 11, the Court set out the elements of the offense charged in counts 2, 3, 5, 6, 7 and 8 using the disjunctive rather than the conjunctive, with regard to all three situations set out above. Additionally, on page 18, the Court gave an explicit instruction to the jury instructing that the government could charge in the conjunctive and prove in the disjunctive.

Before the trial, and at various times throughout the trial, and then in post-trial motions,[3] counsel for all three defendants argued that allowing the conjunctive/disjunctive switch represented an improper material variance of the superseding indictment. It is well-

[3]At the close of the trial, the court ruled that all previous objections are considered raised again, and that all prior rulings applied. Thus, the court finds no issue of waiver present on any of the objections discussed herein.

established in the Eleventh Circuit, however, that a disjunctive statute may be pleaded conjunctively and proved disjunctively.

> Where the language of a statute proscribes several means by which the defendant might have committed a violation, the government may plead the offense conjunctively and satisfy its burden of proof by any one of the means. *See United States v. Burton*, 871 F.2d 1566, 1573 (11th Cir. 1989). However, the court's charge to the jury should track the language of the statute. *See United States v. Brooks*, 670 F.2d 148, 152-53 (11th Cir. 1982).

United States v. Cornillie, 92 F.3d 1108, 1110 (11th Cir. 1996). In the instant case, the statute is disjunctive, the government charged in the conjunctive and the Court instructed the jury by tracking the disjunctive language of the statute. Thus, the Court finds no error in the fact that the instructions are written in the disjunctive while the superseding indictment charges in the conjunctive.

2. Did the Court err in its instruction regarding the word "harboring" as used in the statute?

On page 14 of the jury instructions (doc. 155), the Court gave the jury the following definition of the term "harboring:"

> The word "harbor," as that term is used in the Superseding Indictment or in these instructions, means to facilitate the continued unlawful presence of an illegal alien in the United States. Thus, the

> term "harbor" includes providing shelter to an illegal alien, providing an illegal alien with transportation, or assisting an illegal alien in obtaining employment, so long as such provision of shelter, transportation or employment assistance are done with knowledge of the individual's illegal alien status, or in reckless disregard of his illegal alien status.

All three defendants argue that this jury instruction is improper and level three main attacks against it. First, they argue that the definition of harboring given above causes the charge to omit an element of the crime: *mens rea*. That is, the defendants argue that to constitute a crime, harboring must involve a specific desire on the part of the defendant to give aid to an illegal alien in order to facilitate their unlawful presence in this country. It is not enough, the defendants argue, if the provision of aid to a known illegal alien incidentally helps the person remain in the county [sic] illegally, according to the defendants.

Second, the defendants argue that linguistically, harboring means only "clandestine" sheltering or rendering of aid. According to this argument, if the defendants make no attempt to hide the illegal aliens – as the court finds occurred in this case – there cannot be

harboring.

Third, defendants argue that the statute was not intended by Congress to apply to acts of providing aid that are unrelated to the actual smuggling of the alien into this country. Merely sheltering, aiding or transporting illegal aliens many months after, and many miles away from, their entry into the country, without any involvement in how the aliens got into the country, was not the crime that Congress intended to address when reworking Title 8 U.S.C. § 1324 in 1952, the defendants argue.

The defendants instead insisted that the harboring instruction track the following language from United States v. Kim, 193 F.3d 567 (2nd Cir. 1999):

> As discussed in Part II. A. above, harboring, within the meaning of § 1324, encompasses conduct tending substantially to facilitate an alien's remaining in the United States illegally and to prevent government authorities from detecting his unlawful presence, see, e.g., United States v. Lopez, 521 F.2d at 440-41. Such facilitation may be attempted through a wide range of conduct. In Lopez, we noted a number of such acts, including providing unlawful aliens with housing, transportation, and sham marriage ceremonies, and assisting them in obtaining employment. In United States v. Smith, 112 F.2d 83, 84 (2d Cir. 1940), we

> upheld the conviction of an employer under a 1917 precursor to § 1324, see 8 U.S.C. § 144 (1940) (reaching "[a]ny person . . . who . . . shall conceal or harbor or attempt to conceal or harbor . . . any [illegal] alien"), where the defendant had instructed undocumented aliens that, if questioned, they should deny that they were aliens and say that they were from New York State. We concluded that this constituted "harbor[ing]," for the employees were thus "sheltered from the immigration authorities and shielded from observation to prevent their discovery as aliens." 112 F.2d at 85. See also United States v. Herrera, 584 F.2d 1137, 1145 (2d Cir. 1978) (installation of security systems designed to alert illegal aliens to impending INS on-site inspections and facilitate their escape constitutes harboring); United States v. Fierros, 692 F.2d 1291, 1295 (9th Cir.), cert. denied, 462 U.S. 1120, 103 S.Ct. 3090, 77 L.Ed.2d 1350 (1983) (use of radio scanners tuned to border patrol frequency in vehicles used to transport illegal aliens into the United States constitutes conspiracy to harbor).

As an initial matter it should be pointed out that the defendant in Kim did not house his employees as did the employer in the instant case. Thus, the Kim court could not rely on the obvious "sheltering" aspect of the word harboring. Instead, the Kim court was straining to determine if actions short of sheltering could constitute harboring, and found that actions such as "providing unlawful aliens with . . . transportation, and sham marriage

ceremonies, and assisting them in obtaining employment" could suffice as harboring, in addition to providing housing. Thus, the Kim case is best read as expanding, rather than shrinking the definition of harboring.

The Court in the instant case based the instruction upon the language of several cases, including, importantly, a binding precedent from the former Fifth Circuit, United States v. Cantu, 557 F.2d 1173 (5th Cir. 1977). In Cantu, INS agents arrived at defendant's restaurant and requested consent to enter the premises and determine if illegal aliens were being employed. The defendant refused and the INS agents waited outside the restaurant while they waited for a search warrant to arrive. Upon learning of the presence of the INS agents, several of defendant's employees, who he knew to be illegal aliens, began to hide in the restaurant. He directed them not to hide but to leave by the front door. The defendant argues that this meant that he made no attempt to conceal, harbor or shield from detection the illegal aliens. The government, however, alleged that defendant told them to leave by the front door, and arranged a ride for one of them, with the intent that they blend in with customers

leaving the store and escape detection. Defendant was charged with shielding from detection those illegal alien employees.

Cantu raised various objections to the charges against him, including one which is relevant to the instant case. Cantu argued that Congress in enacting section 1324 intended to proscribe only activities which were "part of the smuggling (of aliens) chain of events." The Cantu panel rejected that argument and stated,

> This argument was recently offered to the Second Circuit, which, after reviewing the statutory history of section 1324, concluded that "there was no suggestion that only conduct forming part of the smuggling process should be proscribed." *United States v. Lopez*, 2 Cir., 1975, 521 F.2d 437, 440, cert. denied, 423 U.S. 995, 96 S.Ct. 421, 46 L.Ed.2d 368 (1976). We agree with the conclusion in Lopez that section 1324 does not prohibit only smuggling-related activity, but also activity "tending substantially to facilitate an alien's 'remaining in the United States illegally.'" 521 F.2d at 441.

Cantu, 557 F.2d at 1180.

By adopting the reasoning of Lopez, the former Fifth Circuit negated the second and third arguments given by the defendants in our case: the conduct charged does not have to relate to the actual smuggling across the border, and the conduct does not have to be

actual hiding of an illegal alien, it can be any conduct "tending substantially to facilitate" an alien's remaining in the United States illegally.

In Lopez, the facts were as follows:

> [Lopez] owned several single family houses in the Levittown-Westbury area of Nassau County, which appellant had operated as havens for aliens who had illegally entered the United States. Appellant admitted knowledge of the alienage of these individuals. Each alien paid him $15 per week for use of one of these refuges as living quarters. Before their illegal border crossings several of the aliens had been furnished with addresses of houses owned by Lopez and, upon making their illegal entry into the United States, had proceeded directly to appellant's houses, where they were received and lodged. Upon a search pursuant to a warrant of six of these houses on July 23, 1974, investigators of the Immigration and Naturalization Service (INS) found 27 illegal aliens residing on the premises.
>
> In addition to providing lodging to large numbers of aliens with knowledge of their illegal entry, appellant had assisted many of them in other ways designed to facilitate their continued unlawful presence in the United States. He had helped some to obtain employment by personally filling out job applications on their behalf and by transporting them in vans to and from work. In return for payment to him of substantial sums of money by others Lopez, as a means of enabling them to assume the guise of an apparently lawful status in the United States, had arranged sham marriages, i.e.,

> ceremonies for marriages that were not consummated, with the participants parting immediately after the ceremony.

Lopez contended that merely providing shelter to an alien with knowledge of his illegal presence in the United States was insufficient to constitute harboring within the meaning of § 1324(a)(3). In addition, he argued that the government must prove that the conduct is part of the process of smuggling of the aliens into the United States or directly connected with the alien's illegal entry. The Second Circuit rejected both of these assertions based on its review of the legislative history.

First, the court looked at the house report dealing with the 1952 law. It stated that its purpose was "to strengthen the law generally in preventing aliens from entering or remaining in the United States illegally" (emphasis added by Lopez court). See H. Rep. No. 1377, 82d Cong., 2d Sess. Second, the Lopez court noted that several congressmen in the debates over the bill made statements which revealed that they knew that conduct totally unconnected from the smuggling in of aliens would be covered by the statute and that conduct which did not involve clandestine harboring would be

covered.

The Lopez court does not specifically cite to these provisions. The instant Court has conducted an independent review of the legislative debate, however, and concludes that the general conclusion reached by the Lopez court is correct, but the decision is not hardly as clear as the Lopez court intimates.[4]

Two instances reveal this especially well. In one instance, Representative Morano from Connecticut asked Representative Celler, the sponsor of the bill in the house, the following question:

> MORANO: What is the definition of "harboring?" Suppose an illegal alien from Central Europe came into the United States and was living at the home of a relative or friend. Would that constitute harboring?

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[4]As an initial matter, the Court finds that the word "harboring" as used in the statute has no plain meaning. For example WEBSTER'S THIRD INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE 1031 (1971) defines "simple sheltering" as the primary meaning of "harbor," while the Oxford English Dictionary takes the opposite view, labeling "to provide a lodging or lodging place for" as an "obsolete" definition of "harbour." Instead, the Oxford English Dictionary gives the leading current definition of the term as ". . . to give secret or clandestine entertainment to noxious persons or offenders against the laws." 6 OXFORD ENGLISH DICTIONARY 1102 (2d ed. 1989). See Gregory A. Loken & Lisa R. Babino, *Harboring, Sanctuary and the Crime of Charity under Federal Immigration Law*, 28 HARV. C.R.-C.L. L. REV. 119, 143-44 (1993) ("The anti-harboring provision, however, is quite special. Its language presents enormous interpretative problems, most obviously in its use of the term 'harbor.'"). Because the word does not have a plain and obvious meaning, resort to secondary methods of interpretation is necessary.

The bill's sponsor answered:

> CELLER: If that relative or friend, with all knowledge of the facts, harbors or shields or protects that alien illegally he is afoul of the law.

98 CONG. REC. 1341 (1952).

While this language appears helpful at first blush, it is actually quite circular. Representative Celler appears to focus on knowledge as the crucial factor but then requires that the relative or friend harbor the alien "illegally" to be afoul of the law. The inclusion of the word "illegally" either makes his statement a tautology or indicates that he intended there to be a sense of illegality in the person's mind as they harbored the alien. In other words, Rep. Celler might have been thinking "willfully" when he said "illegally." Later, the Senate took specific aim on the concept of willfulness in the statute.

After a bill was introduced in the Senate which would have struck language requiring the harboring to be done "knowingly and willfully," Senator Hubert Humphrey and Senator Lehman from New York mounted an attack that resulted in the addition of that language. In the course of the debate, Senator Humphrey related this potential

nightmare scenario:

> HUMPHREY: The McCarran Bill would strike out the words "willfully and knowingly," and if one merely harbored an illegal entrant, he would be guilty of a felony. That is going quite a long way. It means, for example, that if some good soul should open his door in the cold of night and see standing before him a shivering, bedraggled person, and should offer him the comfort of his house for the evening, so that he would not perish from the cold or rain or storm, that good Christian act, that act of compassion, might result in the householder being charged with the commission of a felony.
>
> As I have said, this might apply to a hotel. Under the provisions of the bill, every single hotel would have to ask its guests for evidence that they were legally in the United States. Before long, we would have to travel around with all kinds of official identification papers, which, by the way, is the practice in may countries of Europe.
>
> It is difficult for me to believe that the framers of the McCarran bill would want to do this, but again I say, in the haste of writing this legislation, they may not have given full consideration to all of the possible consequences of the law.

98 CONG. REC. 5319-21.

As this passage shows, Senator Humphrey saw two problems with the bill without the knowing and willful language. First, the example he gives about the Christian act of compassion goes to the willfulness element. The "good soul [who] opens his door in the cold of night" would be protected under the language Sen. Humphrey proposed because he would not be acting "willfully." Second, the

example of the hotel owner goes to the knowledge element. The hotel owner who does not actively know of the illegal status of one of his guests would be protected under Senator Humphrey's language because he would not have acted "knowingly."

Senator Morse, apparently a sponsor of the bill, explained his view of the bill, attempting to allay Senator Humphrey's fears:

> MORSE: As I read the section, it is aimed at persons who seek to smuggle aliens into the United States illegally.
> I assume that the objective is to apply the section to any person in the field or activity of transportation who smuggles aliens into this country. The Senator has referred to such aliens in this instance as a type of wetback. This section provides that anyone who brings such aliens into the country shall be guilty under this provision.
> Apparently that is what the committee is aiming at. He shall be guilty if he conceals or harbors, or attempts to conceal or harbor, or assist or abets another to conceal or harbor, in any place, including any building, or any means of transportation. Up to that point in this section the bill is aimed at punishing the transporter. Or a person who is a party to the transportation.

98 CONG. REC. 5319-21.

This language makes it sound as if at least Senator Morse intended the statute to apply only to those connected to the actual smuggling. However, Senator Lehman from New York quickly noted that the language of the section was not so limited:

> LEHMAN: [the statute] does not limit the provision to transportation at all, because further on the section provides – [he discusses the statutory language covering harboring.] Therefore, the section is not confined merely to transportation; nor to a pilot, owner, operator, master, commanding officer, agent or consignee. In other words, it would apply to any person who harbors an alien in any place whatever, including any building. It seems to me it is a catch-all provision.

The passages by Senators Humphrey and Lehman show that they assumed that harboring can consist of mere sheltering, but thought it was a bad idea to impose liability for mere sheltering unconnected to knowledge, and – importantly for our purposes – a willful intent to do something more than just help your fellow man. From the passages, it seems that the willfulness they envisioned was a desire to aid the smuggling process, and not a mere willingness to help someone <u>despite</u> their illegal alien status.

Based on these concerns, one might expect the Senators to add language which specifically required the harboring to be done with the intent to aid the smuggling process. Instead, they merely insisted on adding the generic "knowingly and willfully" language.

> HUMPHREY: If an amendment [requiring knowingly or willfully language to be added] is offered, it would cover the situation. Is that not correct?

Senator Morse then explained that he believed the bill was intended by the committee to only cover those who smuggled individuals or those who aided and abetted those who smuggled by providing shelter after the transportation across the border. He stated that because of that intended limitation, the "knowingly and willfully" language would be consonant with the goals of the bill. Senator Lehman also agreed that the "knowingly and willfully" language was necessary and appropriate, but wanted to make sure that it applied to both the harboring clause and the transportation clause, relying explicitly upon the nightmare scenarios posited by Senator Humphrey. 98 CONG. REC. 5319-21.

All of the senators who spoke to the issue, therefore, agreed that the inclusion of the word "willfully" in the statute indicated that "harboring" did not cover sheltering unless the sheltering was closely related to the smuggling process. Thus, if the Zhengs were charged under the 1952 version of the act, they would not be guilty of the crime of harboring as Congress intended it.

In 1986, however, Congress amended this section and removed the "knowingly and willfully" language. Instead, after

1986, the statute required only that the defendant act "knowing or in reckless disregard of" the illegal alien status of the individuals involved.

A review of the 1986 legislative history reveals that Congress did so in response to an Eleventh Circuit opinion regarding the Mariel boat lift. Here is what the House Report stated about the reasoning behind the "knowing or in reckless disregard" language of the 1986 Act:

> Section 112 of the bill would modify the existing law regarding smuggling and related offenses to expand the scope of activities proscribed. The Committee believes such modifications are essential in light of recent judicial opinions which have interpreted existing law as not applying to certain activities that clearly are prejudicial to the interests of the United States.
> Specifically, section 112 is designed to correct the shortcomings and ambiguities in existing law identified in United States v. Anaya, 509 F. Supp. 2289, en banc, (S.D. Fla. 1980, Aff'd on other grounds, sub nom. United States v. Zayas-Morales, 685 F. 2d 1272 (11th Cir. 1982)) and in United States v. Zayas-Morales as well. The issue in Anaya was whether current law (U.S.C. 1324(a)(1)) would subject to criminal prosecution certain boat owners and crew members who willingly and knowingly transported undocumented Cuban nationals to the United States during the Mariel boatlift of 1980. Of crucial significance was the fact that the defendants in the case made no effort to land any undocumented Cubans surreptitiously or evasively, but instead brought them directly to immigration officers in Key

> West. Because existing law makes it a felony for anyone to 'bring into' the United States an undocumented alien, the issue became the meaning of the term 'bring into.' The district court, sitting en banc, resolved this issue by holding that 'bring into' is synonymous with 'entering,' and that since none of the undocumented Cubans ever 'entered' the United States the indictments had to be dismissed. On Appeal, the district court decision was affirmed, but for different reasons, United States v. Zayas-Morales, supra.. The Court of Appeals focused on the defendants' state of mind and held that because the defendants lacked general criminal intent, (i.e., the intent to commit an illegal act), they could not be prosecuted under section 1324(a)(1).
>
> The Committee is convinced that this gap in current law must be closed. Without the threat of criminal prosecution, there is no effective way to deter potential transporters from inundating U.S. ports of entry with undocumented aliens. As happened during the Mariel episode, the United States would be forced to expend extraordinary amounts of money and human resources in processing, monitoring caring for and giving hearings to exorbitant numbers of people. Accordingly, the bill clarifies that a person who knowingly transports an undocumented alien to any place in the United States will be subject to criminal prosecution if that person knew the alien was undocumented or acted with willful blindness concerning the alien's immigration status.

H. Rep. No. 99-682, at 66 (1986). The above language makes clear that Congress did not simply omit a mens rea with regard to this statute. Instead, Congress consciously chose to change the mens rea from "knowingly and willfully" to "knowing or in reckless disregard."

The problem with applying this legislative history to our case, however, is in the last paragraph cited above. Obviously, in the forefront of the minds of the members of Congress in 1986 was the specific problem of those who transport aliens into the country. Congress was concerned with boat captains inundating our ports of entry with thousands of refugees, totally at the boat captains' whim and prejudicial to what Congress perceived were "the interests of the United States." Thus, the 1986 Congress, with preventing this in mind, removed the willfulness requirement.

Congress did so, however, without even the briefest discussion of Senator Humphrey and Lehman's nightmare scenarios. In short, there is nothing in the legislative history of the 1986 Act which specifically discusses whether the requirement of "willfulness," which Senator Humphrey had insisted upon, was intentionally discarded *sub silentio* with regard to those who are <u>not</u> related to the actual smuggling process. However, the general structure and scope of the 1986 Act indicates that this may have been Congress' intent.

For the first time, in 1986, Congress showed a willingness to

extend beyond the border smuggler and into the interior of the country. Calling employment in America the great magnet drawing millions to enter the country illegally, Congress decided after a decade of debate to impose sanctions against employers who hire illegal aliens. This shift of focus, from the border to the interior, supports a conclusion that Congress probably would intend this statute to be interpreted to apply to those removed from the smuggling process, because without a place to stay once they got here, the illegal aliens would theoretically be less likely to risk a border crossing.

The horrible implications of this interpretation are obvious. Congress and the courts know, beyond a doubt, that there are millions of undocumented men, women and children in this country right now who will need food, clothes and a place to stay tonight. If anyone allows any one of them to stay even one night in any building of any kind, the "good soul" who does so becomes a felon, punishable by up to five years in prison for each person to whom comfort was given. The harshness of this interpretation is highlighted when one considers the testimony of various individuals

in the case before the court that it is a policy of INS to parole undocumented aliens into the country pending their deportation hearings. The INS apparently allows them to be in the country while § 1324 simultaneously make it a felony to give them any aid which allows them to live in anything but abject misery once they are here.

But does this mean that Congress did not intend the law to mean just that? Consider the Mariel boat captains. Faced with the prospect of tens of thousands of individuals attempting to cross the waters between Cuba and Florida, and the virtual certainty that hundreds if not thousands of them would not survive the journey in makeshift rafts, the boat captains chose to ferry the individuals across instead.[5] Congress, in the 1986 Act, explicitly stated its intent to make such humanitarian conduct a crime. Accordingly, the same Congress likely would support an interpretation of the statute under which mere sheltering – unrelated to smuggling and without an intent to conceal the aliens – constitutes harboring and a violation of the statute. For these reasons, the definition of harboring used by the

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[5] See PA3 Judy L. Silverstein, MSO Tampa, *Memories of Mariel: 20 Years Later*, available at http://uscg.mil/hq/reserve/magazine/mag2000/apr2000/mariel.htm, for the Coast Guard's account of the 1980 Mariel Boatlift.

Court was not in error.

3. Did the Court err in instructing the jury regarding reckless disregard using a modified version of the standard Eleventh Circuit jury instruction for deliberate ignorance?

The above legislative history also reveals that this Court was correct in using a modified "deliberate ignorance" instruction to define reckless disregard. The instruction given by the Court is as follows:

> The phrase "reckless disregard," as that term is used in the Superseding Indictment or in these instructions, means that the defendant deliberately closed his or her eyes to what would otherwise have been obvious to him or her. No one can avoid responsibility for a crime by deliberately ignoring what is obvious. So, if you find from all the evidence beyond a reasonable doubt that the Defendant deliberately and consciously tried to avoid learning the illegal alien status of the individuals listed in the Superseding Indictment, in order to be able to say, if apprehended, that the defendant did not know the illegal alien status, you may treat such deliberate avoidance of positive knowledge as reckless disregard of the existence of that fact. Stated another way, a defendant's knowledge of a particular fact may be inferred from a deliberate or intentional ignorance or deliberate or intentional blindness in the existence of that fact.
>
> It is, of course, entirely up to you as to whether you find any reckless disregard or

> deliberate closing of the eyes and the inferences to be drawn from any such evidence. You may not infer that a defendant had knowledge or reckless disregard, however, if the evidence merely shows a mistake, negligence, carelessness, or a belief in an inaccurate proposition.

(Jury Instructions, doc. 155, p. 12-13).

The house report above substitutes the phrase "willful blindness" for "reckless disregard" in several places, indicating that Congress intended reckless disregard to mean the same thing as willful blindness. Moreover, the Eleventh Circuit has approved deliberate ignorance jury instructions which equate "deliberate ignorance" with "willful blindness." See United States v. Adair, 951 F.2d 316, 319 (11th Cir. 1992). Therefore, the Court was correct in fashioning an instruction which equates reckless disregard with deliberate ignorance, as the above instruction did.

4. Arguments raised in the briefs and during trial.

The following arguments are also raised in the post-trial motions but were already fully addressed and rejected by the Court during trial: (1) whether there was insufficient evidence to support convictions based on Jose Alfredo Ovila (count two) and Benjamin

Garcia (count three) because of a lack of INS records showing them to be illegal aliens; (2) there was no evidence implicating Jin Shuang Zheng, the female defendant, offered at trial. The Court finds nothing new in the briefs to justify changing the Court's previous rulings and so the previous continue to apply.

5. Whether merely employing an illegal alien in a business that is profitable suffices to meet the aggravating circumstance of "done for commercial advantage or private financial gain."

Raised frequently during the trial and running through all of the post-trial briefs is the contention that the government has not proven the crime in the indictment but has proven some other crime. The defendants in this case are charged with harboring illegal aliens, knowing or in reckless disregard of their illegal alien status, for commercial advantage or private financial gain. Moreover, in the superseding indictment, the Government stated that the purpose of the conspiracy was to exercise complete control over the illegal aliens and to make greater profits by paying the illegal aliens less because they could not take any legal action against the employers because of their illegal status and because they would be unable to

leave.

However, as discussed above, the Court, having heard the testimony in the trial and reviewed the evidence, found that the government has not proven that the defendants were paying the illegal aliens substandard wages, has not proven that the defendants were forcing the defendants [sic] to work excessive hours, and has not proven that the defendants attempted to control the movement of and to prevent the departure of any of the individuals in this case. Indeed, despite the stated purposes of the conspiracy in the Superseding Indictment, by the time the trial ended, the government had shifted gears on this issue. In the charge conference and in closing, the government simply argued that using the aliens in a business was enough to constitute a commercial advantage or private financial gain.

The government, and the Court in drawing up the instruction, relied upon language from United States v. Kim, 193 F.3d 567 (2nd Cir. 1999). In the Kim case, the owner of a garment factory employed dozens of illegal aliens even after being frequently cited by the INS. To avoid detection, he devised an elaborate scheme of

name changes, document fabrication and green card switching. One of the illegal alien employees was pivotal to this making this scheme work, and the government focused on that individual to convict Kim. With regard to that individual, the Kim court set out the following facts to support its conclusion that the illegal alien was harbored for a commercial advantage:

> The evidence that Kim had relied on Farfan to assist him in running his business consisted principally of Farfan's testimony describing her job duties at Sewing Masters, which included review of new employees' social security cards and green cards, the execution of employer verifications to be submitted to the INS, and the day-to-day handling of employee time cards for payroll purposes. Some of these administrative tasks were obviously necessary to the running of any business, and Farfan's performance of certain of these duties sometimes had an unusually direct impact on Kim's profit.

Based in large part on this language, the undersigned gave the following instruction in the Zheng's [sic] case:

> In addition to proving to you beyond a reasonable doubt that the defendant concealed, harbored or shielded from detection an illegal alien knowing or in reckless disregard of his illegal status, or conspired to do so, the government must also prove beyond a reasonable doubt that the offense was done for the purpose of commercial advantage or private financial gain.

> The term "commercial advantage," as that term is used in the Superseding Indictment or in these instructions, means that the defendant had a commercial business or enterprise and that the offenses described above were done with the specific intent of benefitting the commercial enterprise or business.
>
> The term "private financial gain," as that term is used in the Superseding Indictment or in these instructions, means that the offense was done for the specific intent of the causing of monetary or other financial gain for the defendant.
>
> The law does not require that a defendant actually realize either a commercial advantage or private financial gain. It is only necessary that the activity be for the purpose of commercial advantage or private financial gain.
>
> (Jury Instructions, doc. 155, p. 15).

At the time, the Court was persuaded that this language taken from the Kim case accurately reflected congressional intent, but now, having had the chance to review the actual Congressional Record (portions of which are only available on microfilm), the Court is convinced that Congress intended something quite different than what the Kim court held. Additionally, it should be noted that the Kim case stands alone among the circuits in making mere employment enough to trigger the enhancement for commercial

advantage or private financial gain.

In short, as discussed more fully below, the focus of Congress in enacting the enhancement relating to commercial advantage or private financial gain was primarily to go after the professional smuggler, the person who brought people across the border for money. Additionally, some members of Congress were willing to expand the meaning of the provision to include those who relied upon the illegal alien's inability to complain in order to exploit the alien by paying substandard wages, controlling their movements and forcing them to work excessive hours. But the Congressional Record is replete with examples of Congress' reluctance to go after mere employment as a crime at all, much less as a basis for an enhanced penalty. In fact, as discussed below, the organization of the statutes, the legislative history, the existence of complex employer sanctions in a nearby statute, and common sense all compel the conclusion that Congress simply did not intend for employment alone, without exploitation or a bargain to the employer based on the employee's illegality, to trigger the enhanced penalty for commercial advantage or private financial gain.

Thus, while it is probably true that the defendants committed two other crimes – (1) knowingly hiring people without checking their credentials as required under the employer provisions of the § 1324a, and (2) harboring illegal aliens by giving them shelter while knowing of their illegal status – it is also true that the government has not proven that the defendants committed the crime charged in the indictment – harboring illegal aliens for commercial advantage or private financial gain.

a. ***The organization of the statutes shows that mere employment is not enough to trigger the enhanced penalty.***

The statute under which defendants are charged is entitled "bringing in and harboring certain aliens," and in relevant part states:

(a) Criminal penalties

(1)(A) Any person who

. . . .

(iii) knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, conceals, harbors, or shields from detection, or attempts to conceal, harbor, or shield from detection, such alien in any place, including any building or any means of transportation.

. . . .

Shall be punished as provided in subparagraph (B).

(B) A person who violates subparagraph (A) shall, for each alien in respect to whom such a violation occurs–

(i) in the case of a violation of subparagraph (A)(i) or (v)(I) or ***in the case of a violation of subparagraph (A)(ii), (iii), or (iv) in which the offense was done for the purpose of commercial advantage of private financial gain***, be fined under Title 18, imprisoned not more than 10 years, or both;

(ii) in the case of a violation of subparagraph (A)(ii), (iii), (iv), or (v)(II), be fined under Title 18, imprisoned not more than 5 years, or both;

(iii) in the case of a violation of subparagraph (A)(i), (ii), (iii), or (v) during and in relation to which the person causes serious bodily injury (as defined in section 1365 of Title 18) to, or places in jeopardy the life of, any person, be fined under Title 18, imprisoned not more than 20 years, or both; and

(iv) in the case of a violation of subparagraph (A)(i), (ii), (iii), (iv), or (v) resulting in the death of any person, be punished by death or imprisoned for any term of years or for life, fined under Title 18, or both.

8 U.S.C. § 1324 (emphasis not in original).

As you can see, the punishment provisions in subparagraph B set the default penalty at five years for a simple harboring violation (subparagraph (B)(ii)), but if any of three aggravating circumstances are present, the punishment increases. For example, if a person dies

as a result of the harboring, the defendant can receive the death penalty, and if a defendant places someone's life in jeopardy while violating the statute, the defendant can face 20 years. Right next to these horrible aggravating circumstances involving death and risk of death is one involving acts which are done "for the purpose of commercial advantage or private financial gain," which the government insists covers mere employment. That aggravating circumstance subjects the defendants to a maximum of ten years per illegal alien involved.

Since the commercial advantage/private financial gain aggravator is found right next to such serious aggravators involving death, one would expect that Congress envisioned that only serious conduct would be covered by the provision. Indeed, a review of the case law reveals that every circumstance where this aggravating circumstance has been imposed, except the Kim case,[6] involves

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[6]It should be noted, however, that Kim involved a factory in the New York City garment industry, a business sector notorious for sweatshops. See Ariela Migdal, Note, *RCRA in the Workplace: Using Environmental Law to Combat Dangerous Conditions in Sweatshops*, 75:6 NYU L. REV. 1843, 1847-48 nn. 17-24 (Dec. 2000) citing, *inter alia*, U.S. Gen. Accounting Office, "Sweatshops" in New York City: A Local Example of a Nationwide Problem 1 (1989). Thus it is probable that even the Kim case involved a sweatshop.

defendants who actually smuggled the aliens across the border in return for payment or those defendants who run sweatshops where aliens are exploited because of their inability to complain about working conditions. In other words, the aggravating circumstance is used to separate the professional smuggler or the professional sweatshop owner from other defendants.

b. ***The legislative history shows that Congress did not intend to make employers the worst brand of smugglers; rather, Congress intended the opposite.***

The debate on the floor of the House in 1952 supports this conclusion. Congressman Celler, who was the chairman of the Judiciary Committee that passed the 1952 act which first imposed penalties for harboring stated:

> I do not wish to center an attack on anybody except the smuggler and the man who tries to make money out of the misery of some of the workers. That is what I want to get after. Certainly we do not want to get after the good people. It is the bad at whom we aim our shafts.

98 Cong. Rec. 1347 (1952). Congressman Celler made this statement in response to concerns by the members of the 98th Congress that the new law would overly burden honest employers.

He assured them it would not and insisted that the typical employer would not be covered by the bill, instead the only purpose of the bill was to punish "malefactors . . . who exploit and oppress these illegals." Id. at 1346.

Far from demonstrating Congress' belief that simply employing an illegal alien was comparable to killing one or risking the life of one during smuggling, the legislative history behind the 1952 and 1986 immigration laws shows an extreme reluctance on the part of Congress to impose any penalties at all on employers. The concerns about employers was the centerpiece of the debate in Congress in 1952 and eventually resulted in the so-called Texas Proviso added to the end of the harboring provision. That provision stated, "for the purposes of this section, employment (including the usual and normal practices incident to employment) shall not be deemed to constitute harboring." In other words, after raging debate, Congress in 1952 simply declined to make it a crime to employ illegal aliens. *See* Immigration Reform and Control Act of 1986, PL. 99-603, 1986 U.S.S.C.A.N. 5655-56 (setting out history of legislation leading up to 1986 act).

As time went on, however, Congress began to conclude that "as long as job opportunities are available to undocumented aliens, the intense pressure to surreptitiously enter this country . . . in order to obtain employment will continue." Id. at 5660. Throughout the 1970s, Congress considered, but rejected, various bills which included sanctions against employers for knowingly employing illegal aliens. Id. In 1986, Congress finally agreed to impose a graduated scheme of penalties against employers.[7] That was § 1324a, the very next statute after § 1324, the provision covering harboring.

c. *The existence of complex and extensive provisions specifically geared for employers (§ 1324a) shows that Congress did not intend mere employment to trigger the enhancement found in § 1324(a)(1)(B).*

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[7]It should be noted that in 1986, when Congress enacted 1324a, which imposed a graduated scheme of civil and then criminal penalties for employing illegal aliens, Congress also redacted the Texas Proviso from 1324. Most courts have agreed that this does not reflect a desire by Congress to suddenly allow employment to be equated with harboring. Instead, it merely reflects the fact that Congress was about to deal thoroughly with employment in the very next section, 1324a, and the Texas Proviso was no longer needed. As stated in the test of this order, nowhere in the legislative history of the 1986 act is there even a discussion of shy Congress would go through the trouble of working out a complex employer sanction scheme in § 1324a but at the same time allow employers to also be prosecuted under § 1324 and face penalties that dwarf the § 1324a sanctions. See United States v. Moreno-Duque, 718 F.Supp. 254 (D. Vt. 1989) (finding that the simultaneous deletion of the employment exception in 1324 and the addition of 1324a "manifests Congress' intent to create criminal liability for knowing employment of illegal aliens, to the extent of making it a misdemeanor.").

The legislative history and statute itself show the lengths to which Congress went in 1986 to create a system in § 1324a that did not impose undue hardship on employers. First, the employers are provided with a "good faith" affirmative defense if they have followed all of the paperwork requirements found in the section. Id. at 5660. Second, those paperwork requirements are not required for casual hires, do not impose continuing verification requirements, and do not require the employer to do research into the veracity of the documents presented by the employees. Third, the employer is provided with a graduated enforcement regime, beginning with mere citations, evolving to civil fines and injunctive relief and ending with criminal penalties only if a pattern or practice is involved. Id. at 5663.

Nowhere in the 207 pages of legislative history of the 1986 bill provided in U.S. Code and Administrative News [sic], 1986 U.S.C.C.A.N. 5649-5856, is it mentioned or even intimated that Congress intended the "concealing, harboring and shielding from detection" language in 8 U.S.C. § 1324 to be applied against employers at all. Instead, the general mind-set of Congress, to

correct employer behavior through small, consistent punishments rather than stiff ten-year maximums is shown by the following discussion of the injunctive relief provision in § 1324a:

> This provision is designed to strengthen the legislation and improve the government's ability to deal with repeat offenders. Experience has demonstrated that many employers continue to hire aliens even after INS has visited their business and located undocumented aliens, notwithstanding attempts by INS to discourage this practice.

Id. at 5663-64. Surely the Congress that felt it necessary to turn to injunctive relief to combat repeat offenders did not at the same time intend, but fail to even mention, that much higher sentences would be available under § 1324 by simply considering the inevitable sheltering which occurs during employment of illegal aliens as harboring for the purpose of commercial advantage or private financial gain.

Instead, the most reasonable reading of § 1324 and § 1324a is this. In passing the 1986 version of § 1324, Congress was continuing its tradition of heightened concern over those who actually arrange to bring illegal aliens into the country, transport them across the border, and find them a safe place to hide when they

arrive. At the same time, Congress had finally resolved to turn to some type of punishment system for employers but one which was not too harsh. Thus, the very next section, 8 U.S.C. § 1324a, sets up a complex regulatory scheme for employers to follow to ensure that they are not employing illegal aliens. Under that scheme, employers are subject to a graduated schedule of civil and then criminal penalties for knowingly employing illegal aliens.

d. ***Allowing mere employment to trigger the enhancement causes absurd results.***

The legislative history of the statute shows that Congress was always reluctant to hold employers liable for their involvement with illegal aliens. In fact, in 1952, Congress showed a willingness to go after even friends and relatives[1] who let illegal aliens reside with them before going after the employers who gave the illegal aliens jobs. Even in 1986, when the employer sanctions were added, it had taken two decades of debate to convince a majority of Congress to go after the employers. Now, however, under the view espoused by the government, an employer who incidentally gave his

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[1]See the debate between Reps. Merano and Celler, 98 CONG. REC. 1341 (1952), discussed supra, p. 12.

workers housing or transportation would be placed into the one of the three worst categories of offenders, along with those who killed or risked the lives of aliens in smuggling them. This simply is not what the enhancement statute was meant for. As Judiciary Chairman Cellar [sic] clearly stated, the bill was meant to go after "the smuggler and the man who tries to make money out of the misery of some of the workers." 98 Cong. Rec. 1347 (1952, discussed supra p. 25. The Zhengs are not either of those.

From reading the superseding indictment in this case, it is apparent that the Government originally assumed that the Zhengs were in fact running a sweatshop. One can see this in the provisions of the Superseding Indictment which refer to the Zhengs endeavoring to confine the workers or to pay them substandard wages. The evidence at trial, however, pointed to a different scenario. The government did not show that defendants saved money, paid lower wages, or made increased revenues due to the fact that these individuals were illegal. That is, while it is obvious that these employees helped the business succeed by simply being there to put the food out, serve customers, etc., – as would any employees, legal

or illegal – there is no evidence that defendants received a benefit specifically tied to their illegal status. The evidence, viewed most favorably to the government, showed that the illegal aliens were paid the same as the legal aliens and that the wages paid simply were not low, averaging over $4.00 per hour, not counting tips and the free room board and transportation the individuals received.

In short, therefore, the government has offered no proof that the defendants received any gain from the fact that the individuals were illegal. The statute requires that the "offense" be "done for" commercial advantage. Here the offense is not sheltering any person, it is only an offense to shelter an illegal alien. In other words, the real question should be whether the defendants targeted illegal aliens for sheltering and employment because doing so conveyed a commercial advantage or private gain to them over targeting other people for sheltering and employment.

The Court finds that the evidence compels answering that question in the negative. The evidence showed that the defendants' primary interest was in obtaining a steady stream of employees in an industry with high employee turnover. To do this without speaking

English, they chose to use employment agencies with whom they could communicate in their native language. The defendants simply did not care if the workers were illegal aliens or legal aliens.

As discussed above, in not caring about the status of the workers while have reasons to be suspicious about their status in the country, the defendants probably committed two different crimes here. First, they may have violated § 1324a by hiring people without obtaining the proper documentation and assurances. Since this is their first offense, they would probably be penalized by fines and citations. Second, providing shelter to people they knew were illegal or whose status they recklessly disregarded, the defendants probably violated § 1324(a)(1)(A)(iii). This is punishable by 5 years in prison.

However, they were charged with harboring illegal aliens for commercial advantage or private financial gain. This is punishable by 10 years in prison. Since the Court finds that the government cannot prove that they obtained some advantage from the fact of the illegal aliens' status, the defendants cannot be convicted of the crime for which they were charged. Since the fact of "commercial advantage or private financial gain" would increase the statutory

maximum penalty that the defendants would face, such fact must be proven to the jury. United States v. Rogers, 228 F.3d 1318, 1325 (11th Cir. 2000); Apprendi v. New Jersey, 530 U.S. 466, 120 S.Ct. 2348, 2362-63 (2000).

III. CONCLUSION

Having determined that the defendants cannot be convicted of the crime for which they were charged, the Court must turn now to the remedy. The Court could grant a new trial, and this time instruct the jury that a defendant must obtain some commercial advantage or private financial gain from the illegal status of the aliens. However, the Court declines to do this because the government has had the opportunity to offer this proof and the record is clear that the defendants did not derive a benefit from the illegal status of the aliens. Thus, the Court finds that changing the jury instruction would not make a difference, the government has not shown enough to prove this element.

Another possibility is to allow the conviction for basic harboring to stand but to simply sentence the defendants without regard to the enhancement. This at first blush appears to be in line

with what the Eleventh Circuit directed in the Rogers case, which found error but then remanded for sentencing under the provision which did not refer to a specific quantity of drugs. This case differs from Rogers in one crucial respect, however. In Rogers, the indictment was silent with regard to the drug quantity involved, while in this case, the Government specifically included the aggravating factor as part of the charge. Thus, in Rogers the Eleventh Circuit could mandate sentencing based on what was actually charged and submitted to the jury – drug dealing with any specific quantity mentioned – by directing resentencing under the statutory provision that did not mention quantity. The same cannot be done in this case. Here, the government charged a certain crime, the defendants marshaled their defenses against it, and the government attempted to prove it at trial, but failed. This is a simple case of the government failing to prove the crime it charged, with specificity, in the superseding indictment. The Eleventh Circuit stated:

> We have held that "a fundamental principle stemming from the [fifth] amendment is that a defendant can only be convicted for a crime charged in the indictment." United States v. Keller, 916 F.2d 628, 633 (11th Cir. 1990), cert. denied, 499

U.S. 978, 111 S.Ct. 1628, 113 L.Ed.2d 724 (1991). Per se reversible error occurs "when the essential elements of the offense are altered to broaden the possible bases for conviction beyond what is contained in the indictment." Id. at 634.

United States v. Cancelliere, 69 F.3d 1116, 1121 (11th Cir. 1995).

Therefore a new trial is not appropriate, and sentencing the defendants for a crime other the [sic] one charged in the indictment is not proper.

Thus, judgment of acquittal is the proper result. Accordingly, it is hereby

ORDERED AND ADJUDGED:

1. Judgment of acquittal shall be entered in favor of defendants CHANG QIN ZHENG, ZHENG WEI ZHENG, and JIN SHUANG ZHENG.

DONE AND ORDERED this 14th DAY OF September, 2001.

/s/ Maurice M. Paul
Maurice M. Paul, Senior District Judge

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Constitutional Provisions

This case requires interpretation and application of Amendment V of the Constitution of the United States, which provides in pertinent part that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law . . . ."

2. Statutory Provisions

8 U.S.C. § 1324. Bringing in and harboring certain aliens
(a) Criminal penalties
(1)(A) Any person who –

. . . .

(iii) knowing or in reckless disregard of the fact that an alien has come to, entered, or remains in the United States in violation of law, conceals, harbors, or shields from detection, or attempts to conceal, harbor, or shield from detection, such alien in any place, including any building or any means of transportation;

(B) A person who violates subparagraph (A) shall, for each alien in respect to whom such a violation occurs –

(i) in the case of a violation of subparagraph (A)(i) or (v)(I) or in the case of a violation of subparagraph (A)(ii), or (iv) in which the offense was done for the purpose of commercial advantage or private financial gain, be fined under Title 18, imprisoned not more than 10 years, or both;

8 U.S.C. § 1324a. Unlawful employment of aliens
(a) Making employment of unauthorized aliens unlawful
(1) In general
It is unlawful for a person or other entity—

(A) to hire, or to recruit or refer for a fee, for employment in the United States an alien knowing the alien is an unauthorized alien (as defined in subsection (h)(3) of this section) with respect to such employment, or

(B) (i) to hire for employment in the United States an individual without complying with the requirements of subsection (b) of this section or (ii) if the person or entity is an agricultural association, agricultural employer, or farm labor contractor (as defined in section 1802 of Title 29) to hire, or to recruit or refer for a fee, for employment in the United States an individual without complying with the requirements of subsection (b) of this section.

. . . .

(e) Compliance

. . . .

(4) Cease and desist order with civil money penalty for hiring, recruiting, and referral violations

With respect to a violation of subsection (a)(1)(A) or (a)(2) of this section, the order under this subsection--

(A) shall require the person or entity to cease and desist from such violations and to pay a civil penalty in an amount of--

(i) not less than $250 and not more than $2,000 for each unauthorized alien with respect to whom a violation of either such subsection occurred.

(ii) not less than $2,000 and not more than $5,000 for each such alien in the case of a person or entity previously subject to one order under this paragraph, or

(iii) not less than $3,000 and not more than $10,000 for each such alien in the case of a person or entity previously subject to more than one order under this paragraph;

. . . .

(f) Criminal penalties and injunctions for pattern or practice violations

(1) Criminal penalty

Any person or entity which engages in a pattern or practice of violations of subsection (a)(1)(A) or (a)(2) of this section shall be fined not more than $3,000 for each unauthorized alien with respect to whom such a violation occurs, imprisoned for not more than six months for the entire pattern or practice, or both, notwithstanding the provisions of any other Federal law relating to fine levels.